IN THE SUPREME COURT OF THE UNITED STATES

--------- TERM, 19----

No. 78-553

AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN, A Michigan Not-for-Profit Corporation,

and

RAMSAY COLLISION, INCORPORATED, A Michigan Corporation,
Plaintiffs-Appellants,

-VS-

RICHARD H. AUSTIN, Secretary of State for the State of Michigan,
Defendant-Appellee.

Appeal From the Supreme Court of the State of Michigan

JURISDICTIONAL STATEMENT

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AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN, A Michigan Not-for-Profit Corporation, and RAMSAY COLLISION, INCORPORATED, A Michigan Corporation, *Plaintiffs-Appellants*, -vs- RICHARD H. AUSTIN, Secretary of State for the State of Michigan, *Defendant-Appellee*.	Michigan Supreme Court Docket No. 61405; Michigan Court of Appeals Docket No. 31100; Ingham County Circuit Court Docket No. 76-18583-AZ

JURISDICTIONAL STATEMENT

(a) In the above captioned proceedings:

The denial of application for leave to appeal to the Michigan Supreme Court is to be found at 402 Michigan Reports ..... (1978); ..... Northwestern Reporter, Second Series ..... (1978) (96a). The opinion of the Michigan Court of Appeals is to be found at 82 Mich App 574 (1978) (64a, with the dissenting opinion at 95a). The opinions of the Trial Court are appended at pages 39a and 45a.

(b) (i) This proceeding was originally brought as a Michigan Circuit Court action seeking injunctive relief from enforcement of the Michigan Motor Vehicle Service and Repair Act, 1974 P.A. 300, as amended; MCLA §257.-1301, *et seq.;* effective March 1, 1976 (hereinafter the Act, 1a), and a declaratory judgment that the Act was, at least in part relevant here, violative of procedural due process standards guaranteed under the Federal Constitution, Amendment 14, and the 1963 Michigan Constitution, Article I, Section 17.

(ii) The judgment sought to be reviewed is a denial of application for leave to appeal to and by the Michigan Supreme Court, dated and entered July 5, 1978, from a final judgment of the Michigan Court of Appeals, dated and entered April 17, 1978. Notice of appeal to the United States Supreme Court was filed August 23, 1978 in both the Michigan Supreme Court and the Michigan Court of Appeals (97a).

(iii) This Court is believed to have jurisdiction of the appeal under 28 U.S.C. §1257(2), or, in the alternative, under 28 U.S.C. §1257(3) and 28 U.S.C. §2103.

(iv) Cases which are believed to sustain the jurisdiction of this Court are:

Withrow v. *Larkin,* 421 U.S. 35; 95 S.Ct. 1456 (1975)

Ward v. *Village of Monroeville, Ohio,* 409 U.S. 57; 93 S.Ct. 80 (1972)

United States v. *Robel,* 389 U.S. 258; 88 S.Ct. 419 (1967)

In Re Murchison, 349 U.S. 133; 75 S.Ct. 623 (1955)

Wong Yang Sung v. *McGrath,* 339 U.S. 33; 70 S.Ct. 445 (1950)

Panama Refining Co. v. *Ryan,* 293 U.S. 388; 55 S.Ct. 241 (1935)

A.L.A. Schechter Poultry Corporation v. *United States,* 295 U.S. 495; 55 S.Ct. 837 (1935)

Tumey v. *State of Ohio,* 273 U.S. 510; 47 S.Ct. 437 (1927)

Figueroa Ruiz v. *Delgado,* 359 F.2d 718 (1st Cir. 1966)

United States v. *James,* 440 F.Supp. 1137 (D.Md. 1977)

Haley v. *Troy,* 338 F.Supp. 794 (D.Mass. 1972)

Pale De Mendez v. *Aponte,* 294 F.Supp. 311 (D.P.R. 1969)

(v) The statute, the validity of which is herein involved, is cited as MCLA §257.1301, *et seq.,* and its text is set forth in the attached appendix, (1a-....), along with Part 4 of the General Rules promulgated under the Act and cited as Michigan Administrative Code (MAC) R 257.131-R 257.137 (29a).

(c) The questions presented by the appeal are:

(i) Is the Act violative of procedural due process standards guaranteed by the United States Constitution, Amendment 14, insofar as the Secretary of State is legislatively authorized to make rules defining unfair and deceptive practices, to initiate investigations and investigate regulatees who allegedly violate those rules, to decide to prosecute, to prosecute, to make a quasi-judicial determination that a rule has been violated, to invoke civil sanctions precluding the regulatee from doing business or enforcing his contracts, or to make a quasi-judicial determination that an unfair or deceptive practice has occurred and thus that the regulatee has committed a criminal offense, all without any legislative direction as to what does or should constitute an unfair or deceptive practice?

(ii) Did the Michigan Supreme Court err in refusing to review the Michigan Court of Appeals holding that the

statutory scheme was not violative of due process standards in spite of the extent of the Secretary of State's commingled powers and the absence of delegated standards?

(d) A concise statement of the case is as follows:

On March 1, 1976 the Michigan Motor Vehicle Service and Repair Act became effective in relevant part. On March 5, 1976, plaintiff ASCM filed a complaint in Ingham County Circuit Court alleging, in part, that the Act was violative of Michigan and Federal Constitutional due process standards as set out *supra* herein, see Complaint, ¶¶12 and 13, and requesting injunctive and declaratory relief. Upon defendant's motion for accelerated judgment on the basis that ASCM was not a regulatee, plaintiff ASCM joined Ramsay Collision, Inc., a Michigan garage facility and amended its complaint to reflect that joinder. Plaintiffs' first amended complaint then recited in ¶¶16 and 17 the same federal questions raised in ASCM's original complaint. Plaintiff's motion for preliminary injunction was heard on March 18 and 19, 1976 with testimony and argument given, and a preliminary injunction against enforcement of the statute by defendant was entered on March 29, 1976 (40a).

Defendant thereupon complained for superintending control and/or leave to appeal to the Court of Appeals on March 30, 1976, contending that the trial court had exceeded its authority. Briefs were filed by defendant and plaintiffs, plaintiffs again raising the 14th Amendment due process issues of excessive commingling in the absence of legislatively delegated standards. Appellees' Brief in Support of Answer to Complaint for Superintending Control or in the Alternative in Opposition to Application for Leave to Appeal, pp. 4, 5, 6, 7, 8, 10, 13, 14, 15 (all somewhat obliquely as to whether federal Michigan Constitutional concepts of due process were involved), 16, 17 (where

the 14th Amendment issues are squarely raised) and 18 (same).

In an order entered May 4, 1976, the Court of Appeals dismissed defendant's complaint for superintending control without comment (41a).

On defendant's motion for clarification, and by stipulation of the parties, an order modifying the preliminary injunction was entered on June 7, 1976 (43a).

Defendant moved for summary judgment on May 21, 1976, and filed his brief in support on that date. Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment was filed on July 6, 1976, and argued the federal (as well as the state) constitutional issues raised herein.

On October 13, 1976, the opinion of the trial court issued (45a). Circuit Judge James T. Kallman held that the Act contained no adequate standard to guide the Secretary in defining unfair and deceptive practices, so as to constitute "an unconstitutional delegation of legislative authority to the Secretary," October 13, 1976 Opinion (49a), and "that the combination of functions under the present statutory scheme violates due process of law," *id.*, (53a).

The trial court held, however, that the Act was severable, *id.*, (57a), granted plaintiffs summary judgment as to all sections declared unconstitutional, and granted defendant summary judgment as to all sections declared unconstitutional.

An order of summary judgment issued November 3, 1976 (59a), and was subsequently clarified by an Order entered November 16, 1976 (61a), which permanently enjoined the Secretary from promulgating rules defining unfair and deceptive practices and "from promulgating or enforcing rules pursuant to the Act in investigating, prosecuting or handling adjucatory [sic] hearings concerning alleged vio-

lations of the rules," Summary Judgment of November 3, 1976 (60a).

Defendant filed a claim of appeal to the Michigan Court of Appeals on November 24, 1976. Plaintiffs filed a claim of cross appeal on December 7, 1976. On December 22, 1976, defendant applied for leave to appeal to the Michigan Supreme Court prior to decision by the Court of Appeals, and was joined in that application by plaintiffs on January 7, 1977. Those applications for by-pass appeal were denied by the Michigan Supreme Court by an order entered April 6, 1977 (62a).

Defendant then filed his brief in the Court of Appeals on April 22, 1977. Plaintiffs filed their joint appellees-cross appellants' brief on May 25, 1977, again arguing, as appellees, that the compination of functions in one official, acting without legislative standards for guidance, constituted an absence of procedural due process safeguards. Joint Appellees-Cross Appellants' Brief, p. 6. Again, plaintiffs argued federal, as well as state, constitutional decisional law, *id.*, pp. 12, 13, 24, 25, 26, 27, as to the issues raised herein. As cross-appellants, plaintiffs argued the non-severability of the statute, again arguing federal as well as state law. *Id.*, pp. 28-30.

After oral argument on October 12, 1977, the Michigan Court of Appeals issued its opinion on April 17, 1978 (64a), and held the Act fully constitutional under both federal and state law. Court of Appeals Opinion of April 17, 1978, pp. 2-8.

Plaintiffs thereupon applied for leave to appeal to the Michigan Supreme Court, again arguing federal and state constitutional law in raising the excessive combination of functions in the absence of standards issue. Brief in Support of Application for Leave to Appeal, dated May 8, 1978, pp. 8-12.

Following defendant's filing of his reply brief on May 26, 1978, the Michigan Supreme Court denied plaintiffs' application for leave to appeal, "Because the Court is not persuaded that the questions presented should be reviewed by this Court." Order entered July 5, 1978 (96a).

(e) In the Courts below, the question presented herein was consistently argued in the following way:

1. The delegation to the Secretary of State of authority to make rules defining unfair and deceptive practices without any legislative standards to guide his discretion was clearly violative of the Michigan Constitution, Article IV, Section 22: "All legislation shall be by bill and may originate in either house," as interpreted by Michigan decisional law.

The United States Supreme Court has in the past held such grants of unlimited authority to be unconstitutional delegations of legislative authority in cases such as *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; 55 S.Ct. 241 (1935), and *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495; 55 S.Ct. 837 (1935). While the trend in more recent federal cases has been to uphold such delegations, the statutes involved in those cases required the exercise of that power within an "established framework of regularized procedural protection and judicial review," usually with both the statute and the Federal A.P.A. providing that framework. *See*, Davis, Administrative Law Text, Chapter 2 (Third Edition, 1972). Cited part at p. 34.

2. The legislative scheme granting the Michigan Secretary of State such extraordinarily extensive and commingled powers is probably violative of the due process standards required by the Michigan Constitution, Article I, Section 17, as implied by Michigan decisional law, par-

ticularly *Crampton* v. *Dep't of State*, 395 Mich 347, 235 NW2d 352 (1975).

It is probably also violative of the due process standards required by the United States Constitution, Amendment 14, as interpreted in cases such as *In Re Murchison*, 349 U.S. 133; 75 S.Ct. 623 (1955); *Withrow* v. *Larkin*, 421 U.S. 35; 95 S.Ct. 1456 (1975); *Tumey* v. *State of Ohio*, 273 U.S. 510; 47 S.Ct. 437 (1927); *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57; 93 S.Ct. 80 (1972); *Figueroa Ruiz* v. *Delgado*, 359 F.2d 718 (1st Cir. 1966); *Pale De Mendez* v. *Aponte*, 294 F.Supp. 311 (D.P.R. 1969); *Haley* v. *Troy*, 338 F.Supp. 794 (D.Mass. 1972); and *United States* v. *James*, 440 F. Supp. 1137 (D.Md. 1977).

Wong Yang Sung v. *McGrath*, 339 U.S. 33; 70 S.Ct. 445 (1950), of course, went off on the question of applicability of the Federal A.P.A. to deportation proceedings, but again, the elementary principles of inconsistent functions are laid out there. With *Murchison* and *Withrow* we have come a step further and now must ask: Which of "the various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable," *Withrow*, *supra*, at 47, even in the presence of a state administrative procedures act which may or may not cure the effects of that probability of bias.

Plaintiffs contended in the courts below, and continue to contend here, that the *very extent* of the powers granted the Secretary, *by itself*, guarantees a probability of actual bias which is too high to be constitutionally tolerable.

3. It is when problems (1) and (2) are combined, as they were by plaintiffs in the courts below, that the gravity and substantiality of the federal question can be seen. The Secretary may not only make the painting of an automobile red an unfair and deceptive practice under the Act, he may put garagemen doing it out of business and do

everything else necessary through and to finding him criminally liable.

In this regard, the Court's attention is directed to the Unfair and Deceptive Practices Rules which actually have been promulgated, See Appendix at 29a. A grocery-list of rules such as this clearly gives the Secretary totally unfettered discretion to bring about any business practice into the ambit of the statute. As soon as the Secretary decides that he disapproves of a particular practice, he may easily find a rule in that list which makes the practice unfair and deceptive. Section 7 of the Act prohibits engaging or attempting to engage in a method, act or practice which is unfair or deceptive. Thus, violation of the unfair and deceptive practices rules constitutes violation of the Act and subjects the garageman to criminal sanctions under Section 38, as well as to the myriad of civil sanctions contained in the Act.

Although plaintiffs know of no cases to sustain the jurisdiction of this Court on the *combination* of inconsistent functions and delegation without meaningful standards, *U.S.* v. *Robel*, 389 U.S. 258; 88 S.Ct. 419 (1967) is supportive of that jurisdiction in the concurring opinion of Mr. Justice Brennan insofar as he characterized the problem of the constitutionality of §5(a)(1)(D) of the Subversive Activities Control Act of 1950 not as one of overbreadth but as one of a delegation absent meaningful standards in combination with an effect on liberty and the exercise of fundamental freedoms. In both that case and this liberty is at stake. In that case the fundamental freedom was the 1st Amendment freedom of association; in this the right to procedural due process, fair and unbiased, the right to employment, and the right to contract.

As Justice Brennan carefully pointed out, Congress ordinarily may delegate power under broad standards which establish general policy and set a context which limits the power conferred. "Given such a situation, it is possible for

affected persons, within the *procedural structure usually established for the purpose*, to be heard by the implemented agency and to secure meaningful review of its actions in the courts. . . ." *United States* v. *Robel, supra,* at 274-75 [emphasis added]. This expression of constitutional limitations on Congress's power to delegate authority to complementing federal agencies is presumably no less applicable to state legislative branches exercising comparable functions; indeed the standard suggested *may* be too loose for state legislative delegations in the absence of procedural structures clearly comparable to those established in federal law. As a matter of federal law, broad delegation standards, seen as both necessary and desirable in the complex and ever changing fields subject to federal regulation, are consistent with due process demands *as long as* those standards identify a context of congressional policy and regulatory intent within which the agency's actions are subject to effective scrutiny and review. Practical necessities of a complex society aside, the legislative branch can only delegate — it cannot abdicate. Any other conclusion would force both an obvious breach of the doctrine of separation of powers, which is basic to the structure of state and federal government alike, and establish an untenable probability of denials of due process in the administrative exercise of power.

However easily stated the principles may be, the instant case reveals the application of these principles to be less than simple. The state regulatory scheme in question is undoubtedly extensive in its reach — it affects the primary mode of transportation for virtually the entire population of the State of Michigan and it directly restricts the traditional basic business practices of the entire service industry related to that mode of transportation. Fundamental rights of contract and the ability to maintain gainful employment are the direct objects of regulation. Under the

statute and Rules, the regulatory agency establishes the form of all business transactions in the industry; the same agency investigates for compliance, adjudicates internal and external allegations of noncompliance, enforces administrative civil sanctions and initiates criminal sanctions. The central question presented is whether delegation of this broad spectrum of power over the industry is constitutionally impermissible where the legislative enactment (1) authorizes agency definition of "unfair and deceptive practices: without any standards and (2) commingles all functions of review within that same agency. The agency may outlaw a business practice [utilization of particular estimate forms, for example] by labelling it an "unfair and deceptive" practice and leave the affected regulatee no practical option except to either comply or raise the propriety of the ban in either a criminal defense posture or by means of affirmative judicial challenge to the Rule definition.

An opportunity for effective agency review is impractical for the reason that there are no express statutory constraints or guidelines on the exercise of rule making power and the rule maker is in addition the investigator, adjudicator and enforcer of its rules. This combination of authority almost per force suggests a high probability of institutionalized bias appearing in any internal review of agency rule making power or the application of such rules.

If the judicial challenge option is chosen, the regulatee faces a situation where there is *no* legislative indication of the scope of "unfair and deceptive practices" unless some broad indication is inferred from the context of the various sections of the Act or the pages of a dictionary. Faced with such uncertainty the regulatee must either automatically comply or put at risk both his liberty and his livelihood.

Perhaps the federal question presented here is simply stated, if not answered: How much raw, unfettered, totally

discretionary power over individual liberty, property and freedom may a State confer on its bureaucracy with any particular statutory scheme?

Dated: September 25, 1978.

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APPENDIX

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LIST OF THE PARTS OF THE RECORD

LIST OF THE PARTS OF THE RECORD (CONT'D)

MICHIGAN MOTOR VEHICLE SERVICE AND REPAIR ACT, 1974 P.A. 300, AS AMENDED; MCLA §257.1301, *ET SEQ*

CHAPTER 75. GARAGES AND REPAIR SERVICES (CHANGED)

Motor Vehicle Service and Repair Act

Act 300 of 1974

Sec.

MOTOR VEHICLE SERVICE AND REPAIR ACT
Act 300, 1974, p 1139; eff April 1, 1975.

AN ACT to regulate the practice of servicing and repairing motor vehicles; to proscribe unfair and deceptive practices; to provide for training and certification to mechanics; to provide for the registration of motor vehicle repair facilities; to provide for enforcement; and to prescribe penalties.

The People of the State of Michigan enact:

§ 9.1720(1) Short title.] Sec. 1. This act shall be known and may be cited as the "motor vehicle service and repair act".

§9.1720(2) Definitions.] Sec. 2 As used in this act:

(a) "Administrator" means the secretary of state or any person designated by him to act in his place.

(b) "Department" means the department of state.

(c) "Master mechanic" means a motor vehicle mechanic or specialty mechanic who is certified by the department in all of the specific repair categories pursuant to this act.

(d) "Motor vehicle" means a vehicle which is self propelled, a vehicle which is propelled by electrio power, a motorcycle, a motor driven cycle, a mobile home, or a trailer

as the terms are defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.93 of the Michigan Compiled Laws. For the purposes of this act, a motor vehicle does not include the dwelling or sleeping portions of a motor home, mobile home, trailer, or any recreational vehicle having similar facilities which are not directly connected with the drive mechanism of the vehicle or other areas of repar which would require certification of motor vehicle mechanics as specified in this act or rules promulgated pursuant to it.

(e) "Motor vehicle mechanic" means a technician, individual, or other person who repairs motor veheicles, including the reconditioning, replacement, adjustment, or alteration of the operating condition, including any component or subassembly of a motor vehicle and who receives compensation therefor.

(f) "Mechanic trainee" means a person who desires to become a motor vehicle mechanic or a specialty mechanic, or a master mechanic [and receives a permit from the administrator pursuant to this act].

(g) "Motor vehicle repair facility" means a place of business which engages in the business of performing or employing persons who perform maintenance, diagnosis or repair service on a motor vehicle for conpensation, but excluding the following:

[(i)] A person who engages only in the business of repairing the motor vehicles of a single commercial or industrial establishment or governmental agency. ★

[(ii)] A person repairing his own or a family member's car.

[(iii) A business that does not diagnose the operation of a motor vehicle, does not remove parts from a motor vehicle to be remachined, and does not install finished machined or remachined parts on a motor vehicle.]

(h) ★ "Specialty mechanic" means a motor vehicle mechanic who is certified by the department for a specific repair category or categories pursuant to this act.

(MCL § 257.1302.)

§9.1720(3) Gasoline service stations exclusively; inapplicability of act; minor services, applicability; noncertifcaton of employees.] Sec. 3. Unless the means of doing or engaging in a motor vehicle repair business including the operating of a motor vehicle repair facility is adopted for the purposes of evading this act, and except as otherwise provided in this act, this act shall not apply to gasoline service stations exclusively engaged in the business of selling motor fuel and lubricants ★ [A person or facility] providing minor services, including [but not limited to:] the changing or installing of light bulbs, tires, lamp globes, batteries, air filters, oil filters, windshield wiper blades, fan or power assist belts or lubrication or oil changes and other minor or ornamental accessories or activities incidental to the business of selling motor fuel and lubricants [is hereby declared a motor vehicle repair facility and is subject to this act except that those employees performing only minor repairs need not be certified under this act].

(MCL § 257.1303.)

§9.1720(4) Exemptions.] Sec. 4. Unless the act or practice of repairing, servicing, reconditioning, or engaging in the activity of a master or specialty mechanic is adopted for the purposes of evading this act, this act shall not apply to a person who:

(a) Repairs, replaces, reconditions, adjusts, analyzes, diagnoses, or alters the operating condition of his own [or a family member's] motor vehicle and for which there is evidence of ownership thereof.

(b) Is a master or specialty mechanic, a motor vehicle mechanic, a mechanic trainee or technician who is in the full-time employ of an automotive manufacturer and ★ is engaged solely in that capacity on motor vehicles owned by or being produced by the manufacturer.

(c) Engages solely in the business of repairing the motor vehicles for compensation of a single commercial, industrial, or governmental establishment, or 2 or more establishments related by common ownership or corporate affiliation.

(MCL § 257.1304.)

§ 9.1720(5) Employment of master mechanics.] Sec. 5. [(1)] Effective December 31, 1977, all motor vehicle repair facilities must have at least 1 specialty or master mechanic in its employ certified in each category of repair which it provides.

Inspection and approval of work.] [(2)] After January 1, 1978 any work concerning major service or repair performed by a noncertified mechanic shall be inspected and approved by 1 who is certified in the pertinent specialty.

Certification.] [(3) Effective December 31, 1980, a person shall not engage in the business or activity of a specialty or master mechanic unless the person is certified pursuant to this act.]

Emergency services, waiver of liability, form.] [(4)] Following December 31, 1977, if a customer voluntarily requests services or parts for the repair of a motor vehicle without delay, due to an emergency, from a repair facility in a repair category for which that facility does not have a master or specialty mechanic, that facility may obtain from the customer a waiver of ★ [the customer's rights to have the repair work performed by] a master or specialty mechanic. The waiver shall be executed in duplicate with 1

copy to be given to the customer requesting the repairs and shall read as follows:

"..... (customer) has voluntarily requested..... (repair person) of..... (facility) to provide services or parts in the repair of the below described motor vehicle because of an emergency and thereby waives any claim or cause of action he may have against either..... (repair person) or..... (facility) as a result.

Motor vehicle description:

Customer signature.....

Date.....

Time....."

Limitations on use.] [(5)] This waiver shall not be effective unless given by the customer voluntarily and with knowledge of the implications of the waiver. A motor vehicle repair facility or any one in its employ, including a specialty or master mechanic or mechanic trainee shall not make use of the waiver of liability in an attempt to evade this act.

(MCL § 257.1305.)

§ 9.1720(6) Registration of facility.] Sec. 6. Unless the act or practice is otherwise exempt by this act, a person shall not engage in the business or activity of a motor vehicle repair facility unless the person registers the facility with the administrator pursuant to this act.

(MCL § 257.1306.)

§9.1720(7) Unfair or deceptive practices.] Sec. 7. A person subject to this act shall not engage or attempt to engage in a method, act, or practice which is unfair or deceptive.

(MCL § 257.1307.)

§ 9.1720(8) Administration of act; designee, affiliations.] Sec. 8. The secretary of state or his designee shall administer this act. A person designated by the secretary of state to act in his place shall not be affiliated with a motor vehicle repair facility.

(MCL § 257.1308.)

§ 9.1720(9) Powers and duties of administrator.] Sec. 9. The administrator shall:

(a) Certify master and specialty mechanics [and issue permits to mechanic trainees] subject to this act.

(b) Register motor vehicle repair facilities subject to this act.

(c) Keep a complete register of motor vehicle repair facilities, which shall be open to public inspection at the office of the secretary of state.

(d) Keep an accurate listing by name and by certificate number of each specialty and master mechanic certified by the administrator at the office of the secretary of state.

(e) Engage in a public information program to inform the public of their rights and remedies under this act.

(f) Inform registered motor vehicle repair facilities [at least annually] of the rules promulgated pursuant to this act, [of representative] disciplinary hearings, orders, [or] judgments issued or obtained by the administrator, and suspensions or revocations of registrations or licenses. [A motor vehicle repair facility shall inform the mechanics in its employ of these actions.]

(g) Establish procedures for receiving complaints ★ relating to alleged violations of this act [or rules promulgated pursuant to this act].

(h) [Establish and collect fees for certification examinations administered by the administrator.

(i)] Promulgate rules ★ pursuant to Act No. 306 of

the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

The rules shall included but not be limited to:

(i) Definitions of unfair and deceptive practices.
(ii) Definitions of minor repair services.
(iii) ★ Criteria for determining the competency of specialty and master mechanics, as a prerequisite to continued certification under this act.
(iv) Definition of repair categories for the certification of specialty and master mechanics.
(v) Other rules as are necessary to implement this act.
(MCL § 257.1309.)

§ 9.1720(10) Specialty mechanic; certification; repair categories; fees.] Sec. 10. (1) A person may become certified as a specialty mechanic if that person has passed an examination which the administrator determines is an adequate test of a person's ability to perform certain types of motor vehicle repair. The repair categories for which certification is required include the following and others that may be specified by rule:

(a) Engine repair.
(b) Automatic transmission.
(c) Manual transmission and rear axle.
(d) Front end.
(e) Brakes.
(f) Electrical systems.
(g) Heating and air conditioning.
(h) Engine tune-up.

A person may apply for a specialty mechanic's certificate in any or all repair categories but shall be required to pay only 1 certification fee if the person makes the applications for more than 1 category at one time.

Master mechanics.] (2) A person may apply for and receive a master mechanic's certificate if that person is qualified as a specialty mechanic in all categories of motor vehicle repair.
(MCL § 257.1310.)

§ 9.1720(11) Mechanics; certificate; application, contents; appointment of agent for service of process.] Sec. 11. Before a person offers to engage in or engages in employment as a specialty or master mechanic, that person shall apply for and receive a certificate for that employment from the department. Application for a specialty or master mechanic's certificate shall be made on a form provided by the department and shall include;

(a) The name and home address of the applicant.
(b) ★ The repair category or categories for which ★ [the applicant] is applying and the results of the required examinations.
[(c)] The number of years the applicant has worked as a motor vehicle mechanic for compensation and the education or training he has had to prepare him for work as a motor vehicle mechanic, specialty mechanic, or master mechanic.
[(d)] The states or jurisdictions in which the applicant is licensed or certified to work as a motor vehicle mechanic, specialty mechanic, or master mechanic.
[(e)] A copy of an irrevocable appointment of the secretary of state as the applicant's agent for service of process.
[(f) Other relevant information as the administrator shall require.]
(MCL § 257.1311.)

§ 9.1720(12) Examination; review of examinations; testing agencies, use, procedure.] Sec. 12. An applicant shall

be required to have passed an examination which is designed to test the competency to correctly diagnose and repair motor vehicles in the specific category for which the applicant is applying. The examination shall be written or oral or practical. The administrator shall review examinations that are being given by private or public agencies, including the department of education. If the administrator approves an agency for the purposes of administering examinations, the prospective applicant may take the examination and the testing agency shall forward the results to the administrator for review and verification or the prospective applicant may take such examination as may be developed and given by the administrator.

(MCL § 257.1312.)

§9.1720(13) Mechanic trainees; permits; duration; work under supervision; trainee programs; educational establishments; continuing education and training programs.] Sec. 13. If a person is unable to obtain a certificate as a specialty or master mechanic as provided in this act, and that person desires to become a specialty or master mechanic, he may make application for a mechanic trainee permit on the form prescribed or approved by the administrator. The administrator ★ [shall] issue or approve a mechanic trainee permit to ★ [an applicant] who qualifies under the rules promulgated for that purpose. A person who qualifies as a mechanic trainee may retain that status for a period of not more than 2 years. A mechanic trainee employed by a motor vehicle repair facility shall be required to work under the direct supervision of a specialty or master mechanic during the full time of his employment. The administrator shall by rule establish and operate a mechanic trainee training program designed to provide the training necessary to become certified under

this act. ★ [Instead] of establishing and operating the program, the administrator may appoint schools, academies, or other similar establishments to engage in mechanic trainee training if those establishments, schools, or academies meet the criteria established ★ by the administrator, after consultation with the department of education and the United States department of labor, bureau of apprenticeship and training. The establishments may be designated by the administrator to engage in a continuing education and training program for specialty and master mechanics.

(MCL § 257.1313.)

§ 9.1720(14) Repair facility; registration; form, contents; appointment of agent for service of process; copies of documents.] Sec. 14. A motor vehicle repair facility shall be registered by the owner on a registration form provided by the administrator, which shall disclose the following information:

(a) The name, address, and form of ownership of the facility, and for a corporation, the date and place of incorporation.

(b) The name and address of each of its resident agents, officers, directors, and partners in the state.

(c) The principal occupation for the past 5 years of every officer, director, and partner, and each owner of 10% or more of the facility, and any person occupying a similar status or performing similar functions.

(d) ★ A description of the repair facility to be registered as specified by rule.

[(e)] An irrevocable appointment of the secretary of state as the agent for the facility for service of process.

[(f)] A copy of the documents, instruments, forms, contracts, or other papers known to be used by the appli-

cant in dealing with the public in the repair of motor vehicles as specified by rule.

[(g)] Other [relevant] information as the administrator shall require ★.

(MCL § 257.1314.)

§9.1720(15) Business with more than one facility; single registration form; fees.] Sec. 15. A business maintaining more than 1 motor vehicle repair facility shall ★ file a single registration form annually, which along with the other information required by this act, clearly indicates the location of and the individual in charge of each facility. Fees shall be paid separately for each location.

(MCL § 257.1315.)

§ 9.1720(16) Change of name or address; notice; renewal registration, change.] Sec. 16. If a name or address of the motor vehicle repair facility changes, not involving a change of ownership, the facility shall notify the administrator in writing of the change. Appropriate changes should be made on the renewal registration when due.

(MCL § 257.1316.)

§ 9.1720(17) Inspection; unlawful conduct.] Sec. 17. The registered facility or one required to be registered under this act shall be open to inspection by the administrator during reasonable business hours. A person who hinders, obstructs, or otherwise prevents an inspection is in violation of this act.

(MCL § 257.1317.)

§ 9.1720(18) Records; inspection.] Sec. 18. A motor vehicle repair facility shall maintain such reasonable records as are required by rules promulgated to carry out this act. The records shall be open for reaesonable inspection by the administrator or other law enforcement officials as specified by rule.

(MCL § 257.1318.)

§ 9.1720(19) Duplicate registration, certificate or permit; fee.] Sec. 19. In the event of loss, destruction, or mutilation of a registration, certificate, or permit, the person to whom it was issued may obtain a duplicate copy upon furnishing satisfactory proof of the loss, destruction, or mutilation and paying the fee as determined by rule.

MCL § 257.1319.)

§ 9.1720(20) Renewal of registrations and certificates.] Sec. 20 Registrations and certificates including mechanic trainee permits shall be renewed as determined by rule.

(MCL § 257.1320.)

§ 9.1720(21) Violation of act or rule; unfair or deceptive practices; cease and desist order.] Sec. 21. (1) If the administrator determines after notice and a hearing that a person has violated this act or a rule promulgated pursuant to it, or engaged in an unfair or deceptive method, act, or practice, directly or through an agent or employee, he may issue an order requiring the person to cease adn desist from the unlawful act or practice or to take such affirmative action as in the judgment of the administrator will carry out the purposes of this act.

Temporary cease and desist order; notice; hearing.] (2) If the department makes a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order, it may issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the administrator when possible by telephone or otherwise shall give notice of the proposal to issue a temporary cease and desist order to the facility. A temporary cease and desist order shall include in its terms a

provision that upon request a hearing shall be held with 30 days to determine whether or not the order shall become permanent.

(MCL § 257.1321.)

§ 9.1720(22) Denial, suspension or revocation of registration, certificate or permit; grounds.] Sec. 22. (1) The administrator may deny, suspend, or revoke a registration, certificate, or mechanic trainee permit after notice and opportunity for a hearing where the administrator determines that the facility, mechanic, or trainee:

(a) Engaged in a method, act, or practice which is unfair or deceptive or made an untrue statement of a material fact.

(b) Violated this act or a rule promulgated hereunder.

(c) Violated a condition of probation.

(d) Made unnecessary repairs or repairs not authorized by the customer.

(e) Refused to honor warranties made by a repair facility.

(f) Caused or allowed a customer to sign a document in blank relating to the repair of a motor vehicle.

(g) Was enjoined by a court of competent jurisdiction from engaging in the trade or business of repairing motor vehicles or from a violation of this act or a rule promulgated hereunder.

(h) Where the applicant is a corporation or partnership, ★ [a] stockholder, officer, director, or partner of the applicant ★ [was] guilty of ★ [an] act or omission which would be a cause for refusing, revoking, or suspending a license issued to [the] officer, director, or partner as an individual.

(i) Failed to comply with the terms of a final cease and desist order.

(j) Was convicted of a ★ violation of this act.

(k) Used the waiver of liability provision in an attempt to evade this act.

(MCL § 257.1322.)

§ 9.1720(23) Enjoining violations; bond; suspension or revocation of registration, certificate or permit.] Sec. 23. If it appears that a person has engaged, is engaging, or is about to engage in a method, act, or practice in violation of this act or the rules promulgated hereunder, the attorney general or county prosecutor, may after receiving notice of an alleged violation of this act, with or without prior administrative proceedings having occurred, bring an action in the name of the people of this state to enjoin that method, act, or practice. The action shall be brought in the county where the person resides, or does business. If a person is not established in any one county, the action may be brought in Ingham county. Upon a proper showing, temporary or permanent injunctions may be issued including the appointment of a receiver or conservator. The state is not required to post a bond in a court proceeding. In addition the court may suspend or revoke a registration, certificate, or permit.

MCL § 257.1323.)

§ 9.1720(24) Violation of act or injunction; transmittal of notice and information.] Sec. 24. The attorney general or prosecuting attorney after receiving notice of an alleged violation of this act in a violate of an injuction, order, decree or judgment issued in an action brought pursuant to this act or an assurance under this act shall immediately forward written notice of the alleged violation together with any information he may have to the office of the administrator.

(MCL § 257.1324.)

§ 9.1720(25) Expiration or absence of registration, certificate or permit.] Sec. 25. The expiration or absence of a registration, certificate, or permit of a facility or person shall not restrict the administrator from proceeding with an investigation, petition, disciplinary proceeding, or other action authorized by this act against a facility or person.

(MCL § 257.1325.)

§9.1720(26) Investigations; gathering evidence.] Sec. 26. (1) The administrator shall on his own initiative or in response to complaints, make ★ reasonable and necessary public or private [investigations] within or outside of this state and gather evidence against a person who violated or is about to violate this act or a rule or order hereunder.

Written statements; mediation of disputes; probation or conditions; spot check investigations; examination of vehicles.] (2) The administrator may:

(a) Require or permit a person to file a statement in writing or otherwise as the administrator determines as to all the facts and circumstances concerning the matter to be investigated.

(b) Mediate disputes between parties arising from violations of this act or an administrative rule.

(c) Develop conditions of probation or operation for the facility or mechanic mutually agreed upon and signed by the facility or the mechanic and the administrator ★ [instead] of further disciplinary proceedings.

(d) On his own initiative, conduct spot check investigations of motor vehicle repair facilities registered or required to be registered throughout the state on a continuous basis to determine whether or not the facility is in compliance with this act and rules promulgated hereunder. The administrator may not alter the odometer on a vehicle em-

ployed in such investigations or deliberately misrepresent the condition of the vehicle.

(e) Conduct mechanical and diagnostic examinations of vehicles when there are reasonable grounds to believe that an unlawful act or practice was used to produce the repair or to make the repair.

(MCL § 257.1326.)

§ 9.1720(27) Assurance of discontinuance of violation; contents.] Sec. 27. In mediating a dispute between parties contesting a violation of this act or administrative rule, the administrator may take from a motor vehicle repair facility a voluntary assurance that the facility will discontinue an alleged violation of this act or an administrative rule. The assurance shall be filed in the records of the administrator, shall be open for public inspection, and shall not constitute on the part of the facility making the assurance an admission of any issue of law or fact. The assurance subject to agreement by all parties, may contain provisions whereby:

(a) The facility will refund to an individual consumer an amount of money agreed upon by the parties.

(b) A facility shall take such affirmative action as is appropriate in the judgment of the administrator to correct an alleged violation of this act or a rule.

(c) A facility shall place in escrow a sum of money for the purposes of restitution to an aggrieved consumer pending the outcome of an action pursuant to this act. If the facility accepts the administrator's suggestions and performs accordingly, that fact shall be given due consideration in any subsequent disciplinary proceeding. The assurance shall constitute a contract which may be enforced by the parties in the circuit court upon application being made to the court for that purpose.

(MCL § 257.1327.)

§ 9.1720(28) Oaths; subpoenas; taking evidence; production of relevant matters.] Sec. 28. (1) For the purpose of an investigation or proceeding under this act the administrator or an officer designated by him may administer oaths or affirmations, and upon motion of the attorney general or upon the motion of a party to a proceeding, make application to the circuit court for Ingham county for a subpoena, and if in the judgment of the court there is reasonable grounds to believe a subpoena should be issued, the court shall issue a subpoena to compel the attendance of the designated person, take evidence, or require the production of any matter which is relevant to the investigation or proceeding before the administrator or other officer conducting a proceeding.

Disobedience or failure to answer; compelling compliance; contempt.] (2) Upon failure to obey a subpoena of the court or to answer questions propounded by the administrator or other officer conducting the investigation or proceeding, after reasonable notice to the persons affected thereby, an application may be made to the circuit court for Ingham county for an order compelling compliance. Failure to comply with the order of the court shall be punished as a contempt.

(MCL § 257.1328.)

§ 9.1720(29) Conduct authorizing administrator to receive service of process; force and validity of service.] Sec. 29. If a person, including a nonresident of this state, engages in conduct prohibited by this act or a rule or order and has not filed an irrevocable appointment of the secretary of state as an agent for service of process, and personal jurisdiction over him cannot otherwise be obtained in this state, the conduct itself authorizes the administrator to receive service of process in a noncriminal proceeding

against that person or his successor, if that proceeding originates in conduct that is a violation of this act or an administrative rule hereunder. The service shall have the same force and validity as if served on the person personally.

(MCL § 257.1329.)

§ 9.1720(30) Registration fees.] Sec. 30. (1) The registration fee for the registration of a motor vehicle repair facility shall be set by rule and shall be determined by a sliding fee scale based upon [such factors as] the size of the facility, number of mechanics employed, and volume of repair work performed as determined by the administrator. [The] fees shall be not less than [$25.00] or more than [$300.00].

Certificate fees.] (2) The certificate fee for the certification of specialty and master mechanics and the permit fee of mechanic trainees shall be ★ set by rule ★.

Renewal fees.] (3) The fee for the renewal of the registration of a motor vehicle repair facility, certification of a specialty or master mechanic, including a permit or a mechanic trainee shall be set by rule. The effective length of original and renewal registrations, certificates and permits shall be set by rule [and shall not be less than one year]. The renewal fee for a registration, certificate, or permit that has expired shall be 1½ times the fee for the renewal of a registration, certificate, or permit that has not expired.

(MCL § 257.1330.)

§9.1720(31) Operation without registration or certificate; unlawful operation; bar of actions and liens.] Sec. 31. A person who engages or attempts to engage in the business or trade of a motor vehicle repair facility or specialty or master mechanic without a registration or

certificate, or engages in an act or practice in violation of this act or a rule is barred from bringing or maintaining an action at law or equity on a contract or for the collection of compensation for work performed or materials or parts provided to any other person. In addition, the person is barred from asserting a mechanic's, garageman's or similar lien upon a motor vehicle, including the repossession of a motor vehicle. A customer is entitled to recover any amount paid to an unregistered facility for the repair of a motor vehicle belonging to that customer.

(MCL § 257.1331.)

§ 9.1720(32) Written estimates, contents; excess, limitation; construction of section; actual cost less than estimate.] Sec. 32. (1) A motor vehicle repair facility shall give to the customer a written estimate, itemizing as closely as possible the price for labor and parts necessary for a specific job prior to the commencement of work ★ [. A facility] shall not charge for work done or parts supplied in excess of the estimated price [or in excess of the limit stated by the customer in the waiver provided for in subsection (3)] without the knowing written or oral consent of the customer which shall be obtained at some time after it is determined that the estimated price [or stated limit] is insufficent and before any work not estimated [or in excess of the limit] is done or the parts not estimated [or in excess of the limit] are supplied. [If a waiver is not signed as provided in subsection [sic] (3) and the estimated price is exceeded by not more than 10% or $10.00 whichever is lesser, the written or oral consent of the customer for the excess charge need not be obtained unless specifically requested by the customer.] This section shall not be construed as requiring a motor vehicle repair facility, mechanic, or mechanic trainee to give a written estimated price if he agrees not to perform the requested repair. If

the actual cost of repair is less than the agreed upon estimated cost, the customer shall pay only the actual cost.

Price exceeding estimate or stated limit; repairs not wanted; liability of customer; diagnosis cost.] (2) If the facility or mechanic informs the customer that the price for repair will exceed the written estimate [or the stated limit in the waiver] and the customer does not want the repair work performed then the customer is liable for all reasonable costs to return the vehicle to the condition it was when it entered the facility. These costs should be indicated in written form itemizing the costs as closely as possible with a copy given to the customer. The cost of a diagnosis to be made, whether or not the customer authorizes repairs to be performed, shall be contained in the written estimate before the diagnosis is undertaken.

Waiver of rights; form; contents; use of a waiver.] (3) If a customer initiates a request for a service or parts for the repair of a motor vehicle without receiving a written estimate and voluntarily agrees to pay all reasonable costs of repair [up to an amount stated by the customer], a repair facility may obtain from the customer a waiver of his ★ [right to receive a prior estimate of repair costs]. The waiver shall be in [14] point [or larger] bold capital type face and executed with 1 copy to the customer requesting the repairs and shall read as follows:

"I, ..., voluntarily request ..... to provide services or parts in the repair of the below described motor vehicle without receiving an estimate of repair costs. By signing this form, I understand that I will give up my right to:

1. Receive a written estimate of the cost for repairs;

2. Approve in advance any repairs or costs ★ [with a total cost under $ .....]; and

3. Refuse to pay for repairs ★ [with a total cost less than the amount stated above].

The facility may exceed the amount stated above only after I give my written or oral approval.

Motor vehicle description:

Customer Signature .....

Date .....

Time ....."

This waiver shall not be effective unless given by the customer voluntarily and with full knowledge of the implications of the waiver. A motor vehicle repair facility or anyone in its employ shall not make use of the waiver in an attempt to evade this act.

(MCL § 257.1332.)

§ 9.1720(33) Replaced parts; disposition.] Sec. (33). (1) The administrator shall determine by rule the time and manner in which the motor vehicle repair facility shall return replaced parts to the customer at the time of the completion of the work. This requirement does not apply to parts exempted by the administrator because of size, weight, or similar factors from this requirement, and except for parts that the motor vehicle repair facility or mechanic is required to return to the manufacturer or distributor under a warranty or exchange arrangement. If the parts must be returned to the manufacturer or distributor, the facility or mechanic shall offer to show and upon acceptance of the offer or upon request shall show the parts to the customer upon completion of the work, except the facility shall not be required to show a replacement part when a charge is not being made for the replacement thereof.

Customer's rights; information document, form, contents.] (2) A customer shall be informed of his right to

receive or see replaced parts as provided in this section prior to the customer executing any document or engaging the facility or mechanic for the work. The information shall be given to the customer on the face of any contract, work order form, or sign, or other document evidencing the engagement of the facility or mechanic or by separate written document, in at least 12 point boldface type as follows:

YOU ARE ENTITLED BY LAW TO THE RETURN OF ALL PARTS REPLACED, EXCEPT THOSE WHICH ARE TOO HEAVY OR LARGE, AND THOSE REQUIRED TO BE SENT BACK TO THE MANUFACTURER OR DISTRIBUTOR BECAUSE OF WARRANTY WORK OR AN EXCHANGE AGREEMENT. YOU ARE ENTITLED TO INSPECT THE PARTS WHICH CANNOT BE RETURNED TO YOU.

Sign; display; contents.] (3) The motor vehicle repair facility shall display a clearly legible sign in a conspicuous place at the entrance of the facility indicating that inquiries concerning repair service or complaints may be made to the administrator and shall contain the address and telephone number of the department.

(MCL § 257.1333.)

§ 9.1720(34) Statement upon return of repaired vehicle; contents.] Sec. 34. A motor vehicle repair facility, including a gasoline service station which performs any of the repairs listed in the repair categories of certification for specialty mechanics or developed by the administrator by rule, shall give to each customer a written statement upon return of the repaired vehicle to the customer. The statement shall disclose:

(a) Repairs needed, as determined by the facility.
(b) Repairs requested by the customer.

(c) Repairs authorized by the customer.

(d) The facility's estimate of repair costs.

(e) The actual cost of repairs.

(f) The repairs or services performed, including a detailed identification of all parts that were replaced and a specification as to which are new, used, rebuilt, or reconditioned.

(g) A certification that the repairs were completed properly or a detailed explanation of an inability to complete repairs properly. The statement shall be signed by the owner of the facility or by a person designated by the owner to represent the facility. The name of the mechanic or mechanics who performed the diagnosis and the repair shall also appear on the statement.

(MCL § 257.1334.)

§ 9.1730(34a) Minor repair cost, written estimate unnecessary, exception, request.] Sec. 34a. Unless otherwise requested by the customer, the requirement to furnish a written estimate shall not apply to repair work performed by a motor vehicle repair facility when the total cost for services and parts is less than $20.00. Nothing in this, or any other section, shall cause any repair facility to fail to furnish to the customer a final invoice for the repairs performed and the parts supplied.

(MCL § 257.1334a.)

§ 9.1720(35) False statements; misrepresentations; noncompliance with cease and desist order; penalties; violations separate offenses.] Sec. 35. A resident agent, director, officer, or partner of a motor vehicle repair facility who knowingly authorizes, directs or makes a false statement or misrepresentation concerning the method or price of repair of a motor vehicle, or who knowingly fails to comply with the terms of a final cease and desist order is

subject to penalties under this act. Each violation constitutes a separate offense.

(MCL § 257.1335.)

§ 9.1720(36) Unfair or deceptive practices; liability; double damages, fees and costs.] Sec. 36. A facility that violates this act or who, in a course of dealing as set forth in this act or rules, engages in an unfair or deceptive method, act, or practice, is liable as provided in this act to a person who suffers damage or injury as a result thereof in an amount equal to the damages plus reasonable attorney fees and costs. If the damage or injury to the person occurs as the result of a wilful and flagrant violation of this act, the person shall recover double the damages plus reasonable attorney fees and costs.

(MCL § 257.1336.)

§ 9.1720(37) Mechanic or trainee as agent of facility; effect.] Sec. 37. (1) If a mechanic or mechanic trainee is employed by, or enters into a contract with, a motor vehicle repair facility, that mechanic or mechanic trainee for the purposes of a civil action brought pursuant to this act shall be considered to be an agent of the motor vehicle repair facility and the methods, acts, and practices of the mechanic or mechanic trainee shall be construed as the methods, acts, and practices of the motor vehicle repair facility.

Persons controlling facilities; partners, officers, directors; liability for violations; contribution.] (2) A person who directly or indirectly controls a motor vehicle repair facility or its employees, as well as a general partner, officer, or director of the facility shall be jointly and severally liable among themselves for a violation of this act, unless that person can demonstrate that he did not know, and in the exercise of reasonable care could not have known, of the

existence of the facts by reason of which the violation occurred. There is a right to contribution as in cases of contract among persons so liable.

(MCL § 257.1337.)

§ 9.1720(38) Violations; misdemeanor; penalties.] Sec. 38. Any person, agent, or employee of a ★ [registrant] under this act who knowingly violates ★ this act ★ [is] guilty of a misdemeanor, punishable by ★ imprisonment ★ [for not more than 90 days] or a fine of [not more than] $1,000.00, [or both,] for the first conviction under this act and not more than 1 year ★ or a fine of [not more than] $5,000[, or both,] for any subsequent conviction.

(MCL § 257.1338.)

§ 9.1720(39) Rules; time for promulgation; effective date of act.] Sec. 39. The department shall promulgate the rules to implement this act within 6 months after the effective date of this act. The remaining portions of this act, except as provided in section 5, shall become effective 6 months after the rules are promulgated.

(MCL §257.1339.)

§9.1720(40) Fees; disposition] Sec. 40. The fees collected pursuant to this act shall be credited to the general fund of the state.

(MCL § 257.1340.)

MICHIGAN ADMINISTRATIVE CODE (MAC)
R 257.131 — R 257.137

DEPARTMENT OF STATE

BUREAU OF AUTOMOTIVE REGULATION

GENERAL RULES, AS AMENDED

(By authority conferred on the secretary of state by section 9 of Act No. 300 of the Public Acts of 1974, as amended, being §257.1309 of the Michigan Compiled Laws)

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illiteracy or inability to understand the language of an agreement, if the facility knows or reasonably should know of the customer's inability.

(c) A contract which has gross discrepancies between the oral representations of the facility and the written agreement covering the same transaction.

(2) It is an unfair and deceptive practice to:

(a) Make, either written or orally, an untrue or misleading statement of a material fact.

(b) Fail to reveal a material fact, the omission of which tends to mislead or deceive the customer and which fact could not reasonably be known by the customer.

(c) Enter into a contract which attempts to abrogate, disclaim, or disallow the legal rights, obligations, or remedies of a customer.

(d) Allow a customer to sign an acknowledgment, certificate, or other writing which affirms acceptance, delivery, compliance with a requirement of law, or other performance, if the facility knows or has reason to know that the statement is not true.

(e) Set up contractual provisions, including the statement of repairs and waivers, which are not specific in language, clearly described, or reasonably legible.

(f) Attempt to avoid or evade the law through a contract or any provision thereof.

(g) Fail to promptly restore to the person entitled thereto any deposit, down payment, or other payment when a contract is rescinded, cancelled, or otherwise terminated in accordance with the terms of the contract or the act.

(h) Allow a customer to sign a document in blank relating to the repair of a motor vehicle.

(i) Fail to give the customer a copy of a document evidencing the engagement of the facility at the time of its signing by the customer.

(j) Fail upon return of a repaired vehicle to the customer to give a written statement of repairs to the customer which disclose:

(i) Repairs needed, as determined by the facility.
(ii) Repairs requested by the customer.
(iii) Repairs authorized by the customer.
(iv) The facility's estimate of repair costs.
(v) Actual costs of repairs.
(vi) Repairs or services performed, including a detailed identification of (9) all parts that were replaced and a specification as to which are new, used, rebuilt, or reconditioned.
(vii) A certification that authorized repairs were completed properly or a detailed explanation of an inability to complete repairs properly. The statement shall be signed by the owner of the facility or by a person designated by the owner to represent the facility. The name of the mechanic who performed the diagnosis and the repair shall appear on the statement.

R 257.132. Repair and parts replacement; performance, disclosure, and representation.

Rule 32. It is an unfair and deceptive practice to:

(a) Charge for repairs that are in fact not performed.

(b) Perform repairs which are in fact not necessary, except when a customer insists that a repair be performed in disregard to the facility's advice that it is unnecessary.

(c) Represent, directly or indirectly, that repairs are necessary when in fact they are not.

(d) Perform repairs not specifically authorized.

(e) Fail to perform promised repairs within the period of time agreed, or within a reasonable time, unless circumstances beyond the control of the repair facility, of which the repair facility did not have reason to know at the time of consignment, prevent the timely performance of the repairs.

(f) Represent, either directly or indirectly, that a replacement part used in the repair of a vehicle is new or of a particular manufacture when in fact it is used, rebuilt, reconditioned, deteriorated, or of a different manufacture, or otherwise fail to disclose in writing, prior to the commencement of repairs, the use of used, rebuilt, or reconditioned parts.

(g) Replace a part with one that lacks merchantability or fitness, or represent that parts or components provided or repairs performed are of a particular standard or grade when in fact they are not.

(h) Fail, subsequent to a diagnosis for which a charge is made, to disclose, at the customer's request, a diagnosed or suspected malfunction together with the recommended remedy and any test, analysis, or other procedure employed to determine the malfunction.

R 257.133. Warranties.

Rule 33. It is an unfair and deceptive practice to:

(a) Disclaim or limit the implied warranty of merchantability or fitness for use, unless excluded or modified pursuant to §2316 of the Uniform Commercial Code, Public Act 174 of the Public Acts of 1962, being §440.2316 of the Michigan Compiled Laws.

(b) Fail to extend the period of a repair facility's own warranty for repairs and services, if the customer has been deprived of the use or enjoyment of the subject of the warranty because of a failure on the part of the repair facility to comply completely with the terms of the warranty. The extension shall be equal to or greater than the time of the deprivation.

(c) Fail to honor a warranty on a new part by replacing it with a used part or replacing it with a rebuilt or remanufactured part which does not meet original equipment quality, standards, or specifications.

(d) Fail to honor an express warranty.

(10)

(e) Fail to disclose in written language which is clear as to the nature or scope of a warranty all material aspects and intent, including, but not limited to, what is warranted, who will honor the warranty, the duration of the warranty, obligations if any of the person to whom the warranty is extended, and exceptions and exclusions from the terms of the written warranty agreement.

R 257.134. Advertising and representations.

Rule 34. It is an unfair and deceptive practice to advertise or represent, either directly or indirectly:

(a) Reduced prices for products or services and not sell them at the advertised price during the period of the offering.

(b) Products or services at a particular price during a particular period and fail to extend the offer beyond that period to persons seeking but not obtaining the products or services during the advertised period because the facility has failed to prepare for the reasonably expected demand.

(c) That a customer will receive products or services "free," "without charge," or words of similar import, if

there are undisclosed conditions, terms, or limitations attached to the offering.

(d) Products or services while failing to reveal a material fact, the omission of which tends to mislead or deceive the customer, and which fact could not reasonably be known by the customer.

(e) That a customer will receive a rebate, discount, or other benefit as an inducement for entering into a contract, if the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(f) That a repair facility has the ability to perform repair services using personnel qualified in specific repair specialties, including those specialties enumerated in secton 10 of the act, when in fact the facility does not employ mechanics legally certified in those specialties.

(g) Products or services when there is a material contingency, condition, or limitation on the offer, unless the contingency, condition, or limitation is stated contemporaneously with the offer in a manner clearly and easily understood by the customer.

(h) Products or services in a language other than English without including in the advertisement or representation required disclosures or limitations on the offer in the language principally used in the advertisement or representation.

(i) That mechanics employed by a repair facility are "certified," "licensed," or otherwise qualified when that representation might tend to give the impression that all mechanics employed by the facility are certified or licensed if in fact they are not.

(j) That a customer's failure to act quickly or within a certain period of time to procure products or services will result in the loss of opportunity to procure them at a particular price when in fact this is not the case.

(k) Credit availability in such a manner as to cause a likelihood of confusion or of misunderstanding as to the terms or conditions of credit, or that credit availability or terms are "easy" or words of similar import when in fact that is not the case.

(l) That products or services are sold under the terms of "satisfaction guaranteed or money back" or words of similar import when in fact the customer's declaration of dissatisfaction is not the sole criterion for the refund of money on purchases so warranted.

(11)

(m) The necessity, desirability, or advantage to a prospective customer of dealing with a repair facility by misrepresenting the facility's alleged advantages of size.

(n) That a document which a customer signs is something other than what it is.

(o) An aspect of the repair transaction in a manner causing a likelihood of confusion, or of misunderstanding, with respect to the authority of a mechanic, salesperson, representative, or agent to negotiate the final terms of a transaction.

(p) An aspect of a repair transaction in a manner causing a likelihood of confusion or of misunderstanding, as to the legal rights, obligations, or remedies of a party to the transaction.

(q) That service on an offered product is available under a warranty when in fact it is not available or there are undisclosed limitations or conditions on the availability of that service.

(r) A free or low cost inspection or diagnosis necessitating the removal or dismantling, or both, of a part or assembly and fail to disclose prior to the transaction a

charge for replacement or reassembly in the event the customer declines to authorize a recommended repair.

(s) A product or service at a reduced rate and, upon the facility's failure to provide it at the offered price during the period of the offering to a customer seeking it, to fail to offer and provide the customer the opportunity to obtain the product or service at the same reduced rate within a reasonable period of time after the expiration of the original offer.

(t) Products or services, or the availability or obtainability of products or services in a manner involving the solicitation of waivers by the facility.

(u) Products or services, and fail to meet the reasonably expected public demand for the duration of the advertised offering, except where the advertisement has clearly expressed a specific limitation on the quantity of the advertised products or services.

(v) The words "certification," "licensing," "registration," or words of similar import, of a motor vehicle repair facility or mechanic by an organization, association, governmental entity, or other program or authority other than the administrator, without clearly and conspicuously disclosing the source of the "certification," "licensing," or "registration," and adding the disclaimer "not the Michigan Department of State."

(w) The desirability or advantages of certification or licensing by a federal, state, or local governmental agency, or that a motor vehicle repair facility or mechanic has been endorsed or sanctioned by the administrator.

R 257.135. Liens.

Rule 35. (1) It is an unfair and deceptive practice to:

(a) Assert, claim, or impose a mechanic's or similar type lien where a facility has violated the act or these rules

with respect to the transaction upon which the lien is based.

(b) Seek the repossession of a motor vehicle where a facility has violated the act or these rules with respect to the transaction upon which the repossession is based.

(c) Seek to assert or enforce a lien to the extent of refusing to return a vehicle where the facility has violated the act or these rules with respect to the transaction upon which the refusal is based.

(12)

(d) Fail to return the customer's vehicle if there is a dispute and the customer has paid the amount of the written estimate and any amount in excess thereof agreed to either orally or in writing by the customer.

R 257.136. Estimates and charges.

Rule 36. It is an unfair and deceptive practice to:

(a) Fail, except where legally waived by the customer, to give the customer a written estimate prior to the commencement of work.

(b) Charge for work done or parts supplied in excess of the estimated price without the knowing written or oral consent of the customer.

(c) Fail to give the customer an estimate for the cost, if any, of reassembly, disassembly, or diagnosis.

(d) Fail to inform a customer, at a time prior to the customer executing a document or engaging the facility for the work, by the use of a notice as required by section 33 of the act, of his right to receive or inspect replaced parts for which he will be charged in the repair of his motor vehicle.

(e) Fail to retain a customer waiver with records which are retained concerning the transaction.

(f) Charge the customer storage charges where there is a dispute as to repair charges. Where delays in repairs are caused by lack of parts, a repair facility may make a charge for storage after informing the customer of the approximate length of the anticipated delay and of the daily storage charge rate and obtaining the customer's consent to the delay and the storage charges.

(g) Fail to be in compliance with the federal truth in lending act, 15 U.S.C. §1601 et seq. (1970) as amended and the retail installment sales act, Act No. 224 of the Public Acts of 1966, being §445.851 et seq. of the Michigan Compiled Laws, where the customer finances repairs through the facility.

(h) Fail in practice to comply with advertised or stated payment policies.

(i) Conspire, combine, or confederate to fix prices.

(j) Conspire, combine, or confederate to allocate the market.

(k) Fail to notify the customer of an exchange agreement and charges for exchange parts if a customer wishes to have those parts returned.

(l) Fail to disclose, upon the customer's request, the method used by a facility to compute labor charges.

R 257.137. Coercive Practices.

Rule 37. It is an unfair and deceptive practice to:

(a) Improperly utilize waivers in such a way as to suggest or imply, directly or indirectly, orally or by action, that service or repairs will be improved or expedited if a waiver is signed, or that price will be improved.

(b) Exaggerate the seriousness of the malfunction to induce the customer to agree to the repair.

(c) Suggest or imply, directly or indirectly, orally or by action, that service will be improved or expedited or

that price will be improved if the customer will agree that the facility need not be required to return for inspection parts that have been replaced.

(d) Misrepresent that because of some defect in a customer's motor vehicle, the health, safety and lives of the customer or his family are in danger if the goods or repair services are not purchased when in fact the defect does not exist or the goods or services would not remove the danger.

OPINION OF CIRCUIT JUDGE JAMES T. KALLMAN IN CIRCUIT COURT FOR THE COUNTY OF INGHAM CASE NO. 76-18583-AZ, DATED MARCH 19, 1976

Plaintiffs' Motion for a Preliminary Injunction in this matter having come on to be heard on March 18 and 19, 1976, the Court having heard arguments of counsel in this matter and testimony of witnesses: Dr. Murray, Robert Ramsey, Richard Bos and Ed Carpenter and being fully advised in the premises makes the following determinations.

It appears that there may possibly be irreparable harm from the testimony elicited and therefore to preserve the status quo, a preliminary injunction is granted to enable the Court to determine the full extent and ramifications of Act 12 of 1976 as it modifies and affects Act 300 of the Public Acts of 1974.

An Order may enter in conformity with this Opinion.

(s) James T. Kallman
Circuit Judge

March 19, 1976

ORDER OF PRELIMINARY INJUNCTION IN CIRCUIT COURT FOR THE COUNTY OF INGHAM, DATED MARCH 29, 1976

INJUNCTIVE ORDER

At a session of said Court held in the Courthouse for the County of Ingham located in the City of Mason, Michigan on March 29, 1976.

PRESENT: THE HONORABLE JAMES T. KALLMAN, Circuit Judge

THIS MATTER having come before the Court on plaintiffs' motion and complaint for issuance of a preliminary order enjoining defendant from enforcing the provisions of Act 300 of the Public Acts of 1974, as amended by Public Act 12 of the Public Acts of 1976; and

Notice having been given and the Court having heard argument of counsel; and having taken testimony on March 18 and 19, 1976; and being fully advised in the premises; and

THE COURT having held that enforcement of said statute may cause irreparable harm, it is hereby

ORDERED that defendant be and is restrained from requiring compliance with the provisions of said Act 300, as amended; and it is

FURTHER ORDERED that this Order issue without security being required therefore for the reason that the Order is issued in the public interest pending determination of the constitutionality of the complained-of statute, and it is

FURTHER ORDERED that this Order remain in effect until further Order of this Court.

James T. Kallman
Circuit Judge

Dated: March 29, 1976

Approved as to form:

(s) Edwin M. Bladen (P 10857)
Assistant Attorney General
in Charge
Consumer Protection Division
State of Michigan

(s) Paul Sigal (P 20445)
Attorney for Plaintiffs

ORDER OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN IN CASE NO. 28062, DATED MAY 3, 1976

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 3rd day of May in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

Donald E. Holbrook
Presiding Judge

Glenn S. Allen, Jr.
Daniel F. Walsh
Judges

Order of the Court of Appeals of the State of Michigan in Case No. 28062, Dated May 3, 1976

In this cause a complaint for superintending control, motion for order to show cause and motion for immediate consideration are filed by plaintiff, and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED, that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the motion for order to show cause be, and the same is hereby DENIED for failure to persuade that the preliminary injunction was in excess of the circuit court's jurisdiction or an abuse of discretion.

IT IS FURTHER ORDERED that the complaint for superintending control be, and the same is hereby DISMISSED.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court (SEAL) of Appeals at Lansing, this 4th day of May in the year of our Lord one thousand nine hundred and seventy-six.

(s) Ronald L. Dzierbicki
Clerk

Order Modifying Preliminary Injunction in Circuit Court

ORDER MODIFYING PRELIMINARY INJUNCTION IN CIRCUIT COURT FOR THE COUNTY OF INGHAM. DATED JUNE 7, 1976

At a session of said Court held on the 7th day of June, 1976, in the County Building located at Lansing, Michigan.

PRESENT: The Honorable James T. Kallman, Circuit Judge

The Secretary of State having petitioned this Court for clarification of the Preliminary Injunction, which injunction restrained the Secretary of State from compelling compliance with 1974 PA 300, as amended, known as the Motor Vehicle Service and Repair Act,

And that a hearing on the Secretary of State's motion was had before this Court on May 14, 1976, and this Court having hearing arguments of respective counsel, having reviewed the files and records in this cause and being fully informed in the premises, hereby,

ORDER, ADJUDGES AND DECREES, that the heretofore Preliminary Injunction be and the same is modified whereby the Secretary of State is authorized, along with any employee, agent or servant of the Secretary to engage in the following acts, practices and conduct which shall not constitute contempt of this Court's Preliminary Injunction:

1. Receive and mediate complaints filed with him by consumers relating to motor vehicle repair acts and practices where the motor vehicle repair facility or mechanic voluntarily agrees that the Secretary of State may mediate the complaint or dispute, provided the Complaint shall not become a part of the records of the Secretary of State

and shall be returned upon completion to the respective parties.

2. Receive and process, including collect fees, from persons who voluntarily register pursuant to the act. The acceptance of fees are subject to their being refunded by the Secretary of State to persons who paid them, without resort to claim in the Court of Claims, in the event a final decision is rendered declaring the act unconstitutional. The Secretary of State shall not initiate publicity or other communication campaigns designed to effect voluntary registration unless all such campaigns make explicit the fact that such registration is voluntary.

3. Prepare mechanic certification examinations for mechanics, and give such examinations on a voluntary basis.

4. Advise and consult with persons subject to the act, who elect to voluntarily comply with the act, about their rights and obligations under the act.

5. Carry on other routine administrative functions required of the Secretary of State by the act which do not involve enforcement activities as defined in Paragraph 3 of the Motion for Clarification of Injunctive Order.

.....
Circuit Judge

Dated:

Approved for Entry:

(s) Edwin M. Bladen
On behalf of Secretary of State

By: (s) Paul Sigal EMB
on behalf of Plaintiffs,
Automobile Service Councils
of Michigan and Ramsay Collision, Inc.

OPINION OF CIRCUIT JUDGE JAMES T. KALLMAN IN CIRCUIT COURT FOR THE COUNTY OF INGHAM. DATED OCTOBER 13, 1976

The Defendant's Motion for Summary Judgment in this matter was heard on July 6, 1976. The Court having heard the arguments of counsel, read the briefs, reviewed the record, and further being fully advised in the premises makes the following determinations:

FACTS

On March 18 and 19, 1976, the Court heard Plaintiff's Motion for a Preliminary Injunction to restrain the enforcement of Act 300 of the Public Acts of 1974, as amended by Public Act 12 of the Public Acts of 1976. The motion was granted and an injunctive order was entered on March 29, 1976. A complaint for superintending control was filed with the Court of Appeals by the Defendant. The complaint was subsequently dismissed. This matter is again before the Court on Defendant's Motion for Summary Judgment. The basis of the motion is that the Plaintiff has failed to state a claim upon which relief can be granted because the Motor Vehicle Service and Repair Act is a proper constitutional exercise of legislative power. Plaintiff has responded with a request for summary judgment in its behalf as a matter of law.

ISSUES

1. Whether the statute is offensive to federal and state antitrust laws?

2. Whether Public Act 300, as amended, contains an improper delegation of legislative authority?

3. Whether the combination of the functions of rule-making, investigation, hearing and judging in one executive officer is offensive to due process of law?

4. Whether the legislature has improperly limited or eliminated a previously legitimate business practice?

5. Whether the provision regulating the giving of estimates is unconstitutionally vague?

6. Whether Michigan's general severability statute saves the remainder of Public Act 300?

DISCUSSION & FINDINGS

Before getting into a discussion of the specific questions presented a brief note should be made on the areas in which the parties are in apparent agreement. It is evident that the auto repair industry is not an improper subject for legislative consideration. The parties agree that if there are abuses in the industry, legislative action is a proper means of dealing with them. It is agreed that the legislature has the power in the interest of protecting the public's health, safety and welfare to regulate the trade, occupation and business of repairing motor vehicles. The Plaintiff's contention is that this power is not without limitation. That contention will be dealt with in the course of this opinion. Finally there is agreement that the legislature in providing for a regulatory scheme may impose a fee for the issuance of a license. Plaintiff's complaint is that the rules promulgated pursuant to the statute do not follow the fee guidelines set out in the statute. If this is true then Plaintiff's remedy lies with an attack on the rules not on the statute. Plaintiff has already agreed that the section of the statute dealing with fees is proper. With these preliminary observations the Court will now proceed to the specific questions presented.

1. It is clear that under *Parker* v *Baun*, 317 US 341; 63 S Ct 307 (1943) the Sherman Act does not apply to state action.

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Parker* at page 351.

The issue was dealt with again in *Goldfarb* v *Virginia State Bar*, 95 S Ct 2004 (1975). At page 2015 the Supreme Court stated:

> "The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign."

In *Goldfarb* minimum fee schedules were struck down. The Court rejected the argument that the anti-competitive conduct was "preempted" by state action. The Court reiterated that the activtities must be compelled by the state acting as sovereign. Here the Act creates a monopoly for motor vehicle repair services for those who are registered. This monopoly has been established by the state acting as sovereign through the legislature. The Court finds no violation of the Sherman Act and finds nothing offensive to its underlying pro-competitive policy.

2. Section 9(h)(i) of the Act gives to the Secretary of State the authority to define, by rule, what constitutes unfair and deceptive practices. The rules as promulgated contain four pages defining unfair and deceptive practices. The complaint is that the Act contains no standards or policy whereby the Secretary may make a determination

of legislative intent in enacting Act 300, nor is there the guidance of any explicit standard.

In several instances the parties cite the same cases in support of their respective positions. One such case is *Osius* v *City of St. Clair Shores*, 344 Mich 693 (1956).

> "There is no doubt that a legislative body may not delegate to another its lawmaking powers. It must promulgate, not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what occasion, *provided, however, that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits.*" *Osius* at p. 698. (Emphasis added.)

The parties also cite the case of *McKibbin* v *Corporations and Securities Commission*, 369 Mich 69 (1963). In that case the court cited the rule in *Osius*. In *McKibbin* the Commission had been delegated the power to enumerate conduct that constituted "unfair dealing." The court held that the delegated power was not broad enough to include as unfair dealing, discriminatory practices of real estate brokers. Further, if the language of the statute were to be so broadly construed it would constitute an unconstitutional delegation of legislative power. The Court was concerned over the total lack of legislative standard and policy. It is obvious from the *Osius* and *McKibbin* cases that the legislature can delegate authority to an agency but the standards for the exercise of that authority must be reasonably precise.

The Defendant cites *Ranke* v *Corporation and Security Commission*, 317 Mich 304 (1947) in support of his position. In that case the Court opined that:

> "*The act provides a standard by which the commission shall be guided in the making of rules.* It would be quite impossible for the legislature to enumerate all the specific acts which would constitute dishonest or unfair dealing. . . ." *Ranke* at p. 309 (Emphasis added.)

It is true that unfair and deceptive practices may be too numerous for the legislature to enumerate. This is evidenced by the four pages of definitions of unfair and deceptive practices contained in the rules as promulgated by the Secretary. However, there remains a question of whether there is an adequate standard to guide the Secretary in defining unfair and deceptive practices.

The title of the Act indicates that its purpose is "to proscribe unfair and deceptive practices." Little else is stated except that the Secretary may promulgate rules in this area. While a legislative intent may be gleaned from a reading of the entire statute, the cases clearly indicate that there must be a reasonably precise standard. Such a standard is lacking here. The Court is of the opinion that there has been an unconstitutional delegation of legislative authority to the Secretary.

3. Under Act 300 the Secretary has the authority to promulgate rules, investigate, prosecute, judge, and decide whether to invoke civil or criminal sanctions. Does such a scheme violate due process?

> "The case law, both federal and state, generally rejects the idea that the combination with judging of prosecuting or investigating functions is a denial of due process, although a few execptions can be found." *Davis, Administrative Law Text* (3rd ed). Section 13.02, p. 256.

Professor Davis later in the same section states that federal and state cases differ in two important respects. State courts are more likely to give closer scrutiny on review to the combination of inconsistent functions, and if such functions are upheld they will be justified by a rule of necessity.

In the landmark case of *Crampton* v *Secretary of State,* 395 Mich 347, the court dealt with this issue. The composition of the Appeal Board with members who are full time enforcement officials are not fair and impartial tribunals to adjudge a law enforcement dispute between a citizen and a police officer.

The court held in essence that a decision maker may be disqualified without a showing of actual bias in situations where experience shows that the *probability* of actual bias on his part is too high to be constitutionally tolerable.

A hearing before an unbiased and impartial decision maker is a basic requirement of due process.

Some elements to be considered are:

1. has a pecuniary interest in the outcome of the case.
2. has been a target of personal abuse or criticism from the party before him.
3. is enmeshed in other matters involving the parties.
4. *or might have prejudged the case because of a prior participation as an accuser, investigator, fact finder or initial decision maker.*

This case goes on to say on page 357 that:

> "We do not suggest that police officers and prosecutors are not fair minded. But they are deeply and personally involved in the fight against law violators. . . . The risk that they will be unable to step out of their roles as full time law enforcement officials and into the role of unbiased decision maker in a law enforcement dispute between a citizen and a police officer presents a probability of unfairness too high to be constitutionally tolerable."

Just change the personnel from law enforcement officers to the Secretary of State's staff who investigate, charge, prosecute and judge all working for the same government entity under one boss and a dispute with them by a licensee and you have *Crampton* all over again. Human nature being what it is the distinction between this format and *Crampton* is non-existent. To permit employees of the Secretary of State to do all these things: investigate, charge, prosecute and judge a case against a licensee, creates a probability of unfairness too high to be constitutionally tolerable.

An important case arising in Michigan is *In re Murchison,* 349 US 133 (1955). In that case contempt charges arose out of a grand jury proceeding. The same judge served as the grand jury and later presided at the contempt hearing. Such an arrangement was held to violate due process. The court stated that:

> "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison* at p. 137.

In a recent case arising in Wisconsin involving the revocation of a doctor's license the U. S. Supreme Court severely limited the holding in *Murchison.*

> "Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts,

institute proceedings, and then make the necessary adjudications." *Withrow* v *Larkin,* 421 US 35, 53 (1974).

The Court stated further:

"The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." *Withrow* at p. 55.

Clearly the combination of functions is not per se violative of due process. While similar schemes have been upheld in the past the Court feels that because of the importance of the issue presented the statute should be closely scrutinized.

First of all the Secretary is designated as the administrator of the Act. In this role he is empowered to promulgate rules. The Court has held that under the Act the Secretary cannot constitutionally define unfair and deceptive practices. However, the Secretary can promulgate rules in other areas. As administrator the Secretary has the authority to investigate repair facilit . If it appears that there is a violation of the rules or statute the Secretary may prosecute and sit in judgment. The Secretary argues that due process is the embodiment of fair play. It is difficult to see how there can be fair play when a person has made a decision as to what is right or wrong (rule) and then the same person or one in the same department sits in judgment of one accused of violating that rule. Under such a system there is likely to be some bias, and unquestionably the appearance of bias on the part of the person sitting in judgment. See *Crampton* v *Department of State, supra.*

It was asserted by the Defendant in oral argument that if a fair hearing was not provided then the repair facility could seek redress in the courts. Is it fair play to subject one to a possibily bias proceeding and then tell him if he thought it was unfair he could appeal to the courts? What if the aggrieved individual has no money? There is a real potential for a number of individuals to be deprived of their livelihood because of a biased and unfair hearing. The one man or small operation is obviously discriminated against in such a situation.

For the stated reasons the Court finds that the combination of functions under the present statutory scheme violates due process of law.

4. Section 32 of Public Act 300 deals with the giving of estimates. That section provides for written estimates, itemizing the price for labor and parts necessary for the repair. There can be no charge in excess of the estimate without the written or oral consent of the customer. If the customer does not wish to have the work continued because the price will exceed the estimate he is nevertheless liable for the reasonable cost to return the vehicle to the condition it was in when it entered the facility. Further, the customer can waive the written estimate requirement and agree to pay for the reasonable costs of repair by signing a written waiver.

It should be noted that a written estimate is mandatory but it can be waived. Plaintiff complains that this section eliminates what was previously a legitimate business practice, the fixed price contract.

"The primary determination of public need and character of remedy in the exercise of the police power is in the legislature. Unless the remedy is palpably unreasonable and arbitrary so as needlessly to invade

property or personal rights as protected by the Constitution the act must be sustained. The presumption favors validity and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted." *Carolene Products Co* v *Thompson*, 276 Mich 172, 178 (1936).

The obvious intent of the legislature was to deal with instances where repairs exceeded estimates or where repairs were made that had not been ordered. In those situations the customer had no alternative but to pay because of the repair facility's right to place a lien on the vehicle. Even if the agreed upon contract was a fixed price contract the repair facility could still argue at the time of payment that the quoted price was nothing more than an estimate. The facility, under either type of contract has the lien as a weapon. In either situation the customer is at a serious disadvantage. To remedy the problem the legislature has mandated written estimates.

Section 32 protects all parties. The written estimate must itemize the work to be done. Repairs in excess of the estimate require the consent of the customer. The repair facility can recover the cost of restoring the vehicle to its original condition if additional work is not approved. The customer can waive the written estimate and agree to pay reasonable costs. The legislature has limited the manner in which bargains may be entered into. In the interest of protecting the public's health, safety, and welfare such a limitation is proper

5. The common test in determining whether a statute is vague is whether reasonable minds must guess as to its meaning. The test does not apply to the meaning that might be given by the lawyer who is a clever word wizard.

In interpreting a statute words must be given meaning according to their ordinary usage and in the sense in which they are understood when employed in common language. *American Telephone & Telegraph Co* v *Employment Security Commission*, 376 Mich 271 (1965). A statutory interpretation which leads to an absurd result should be avoided. *In re Lambrecht*, 137 Mich 450 (1904).

Section 32, the section providing for estimates, is the target of the vagueness attack. As mentioned earlier that section provides that the facility shall give the customer a written estimate of the *price* for labor and parts for a specific job. It also provides that "if the actual cost of repair is less than the agreed upon estimated cost, the customer shall pay only the actual cost." What meaning should be given to this statement?

It would appear that the "estimated cost" refers to the written price estimate that must be given to the customer. The term "actual cost of repair" on its face would appear to mean the cost to the garageman for completing the repair. Therefore, the statement in question would mean that if the cost to the garageman to complete the repair is less than the estimated price then the customer pays only what it cost the garageman to complete the repair. The Defendant argues that such an interpretation would be absurd. The Plaintiff argues that such an interpretation would be a taking without due process in violation of the Fourteenth Amendment because it denies the garageman his profit.

What then is the correct interpretation? The Defendant asserts that the term "cost" refers to the amount of money a custmoer will actually pay the facility for a given repair. Under the Defendant's view, the actual cost of repair would be the amount the customer actually pays. Therefore, the statement in question would read: If the

amount of money the customer actually pays is less than the agreed on estimated cost the customer shall pay only the amount the customer actually pays. Aside from making very little sense the statement provides no definitive guideline as to how the actual cost of repair is to be measured. While the Defendant seems to have no problem with the term "actual cost of repair" the garageman would be at a loss as to what the term means and how it is to be measured.

Confusion is added by the Defendant's assertion that "if the actual work performed has a value or price or cost to the consumer less than that estimated, then the consumer should only pay that which is the lesser." While "price" may be included in the term "cost" where does "value to the consumer" come in? Such a term is nebulous at best, and when inserted into the statute it is apparent that reasonable minds would have to guess as to its meaning. The garageman has no way of knowing what the value of the repair is to the consumer. If the consumer knows he will pay only the value of the repair he will obviously state that the repair is of little value.

Based on the preceding discussion the Court can only conclude that the statement "if the actual cost of repair is less than the agreed on estimated cost, the customer shall pay only the actual cost" appearing in Section 32 of Public Act 300 is unconstitutionally vague.

6. Public Act 300 does not contain a severability clause. The Michigan statute dealing with severability reads as follows:

> "In the construction of statutes of this state the following rules shall be observed, unless such construction would be inconistent with the manifest intent of the legislature, that is to say: If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable." MCLA 8.5; MSA 2.216.

The Court has determined that there has been an improper delegation of legislative authority in regards to the authority of the Secretary to define unfair and deceptive practices. Further the combination of the rule-making, investigative, prosecutorial, and adjudicative functions violates due process. Finally, the portion of Section 32 dealing with the amount the consumer will actually pay for a repair is unconstitutionally vague.

The title of Act 300 states that it is:

> "An Act to regulate the practice of servicing and repairing motor vehicles; to proscribe unfair and deceptive practices; to provide for training and certification of mechanics; to provide for the registration of motor vehicle repair facilities; to provide for enforcement; and to prescribe penalties."

This Court cannot say that the legislative purposes, as stated in the title, is made inoperable with the absence of the invalid sections of the Act. The correction of those mistakes is up to the legislature. This Court is of the opinion that the Act is severable.

DECISION

Public Act 300 contains several unconstitutional provisions. It is obvious that portions of the Act are a result of

the improper constitutional exercise of legislative power. However, the Act is severable. The Defendant is entitled to Partial Summary Judgment to enforce the act to all sections not declared unconstitutional. As to these the Plaintiff is granted partial summary judgment.

Just one additional remark that I would like to add to this Opinion is an observation which is contained in the casebook "Enterprise Organization" by Alfred F. Conrad, Robert L. Knauss and Stanley Siegel on pages 8 and 9:

> "Many of the laws that regulate occupations are clearly responsive to genuine public needs. The licensing of saloon keepers, ship's officers, prize fighters, securities dealers, private detectives, and longshoremen, for example was not sought by them. It was imposed as an effective countermeasure against demonstrated abuses.
>
> * * *
>
> "In the first place, occupational licensing and its collateral controls has severely hobbled economic mobility.
>
> * * *
>
> "Second, further indulgence in state control over occupational choices is likely by imperceptible degrees to lessen our cherished right to be different from one another. Americans are certainly not now and probably never have been a tribe of eccentrics; but they have long valued their own individuality, for the country began with non-conformists and each wave of immigration brought us a fresh crop of people ready to try something new. The conditions of modern life place most of us under rather heavy pressures to be conventional in thought and deed, but in the main these pressures are social rather than governmental. Licensing provides the lever that, if pushed down by the weight of official action, can squeeze much of the juice out of our remaining diversity. A hint of this may be found already in some of the irrelevancies that creep into licensure or certification requirements."

An order may enter in conformity with this Opinion.

October 13, 1976

(s) James T. Kallman
Circuit Judge

SUMMARY JUDGMENT IN CIRCUIT COURT FOR THE COUNTY OF INGHAM, DATED NOVEMBER 3, 1976

At a session of said Court held in the County Building, City of Lansing, Michigan, County of Ingham, on the 3rd day of November, 1976.

PRESENT: JAMES T. KALLMAN, Circuit Judge

Upon the motion of the Defendant, Richard H. Austin, Secretary of State for the State of Michigan, for Summary Judgment, and the Plaintiffs, Automotive Service Councils of Michigan and Ramsay Collision, Inc., for Summary Judgment, having been heard by the Court, and the Court having filed its opinion of October 13, 1976, and the Court being fully advised in the premises, therefore orders, adjudges and decrees that the previous Preliminary Injunction of this Court restraining the enforcement of Act 300 of the Public Acts of 1974, as amended by Public Act 12 of

the Public Acts of 1976 (Motor Vehicle Service and Repair Act), is hereby dissolved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of State is permanently enjoined from promulgating rules and regulations defining unfair and deceptive methods, acts and practices as provided in section 9(i)(i), Act 300 of the Public Acts of 1974, as amended, (MCLA 257.1309; MSA 9.1720(9)).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sentence, "If the actual cost of repair is less than the agreed-on estimated cost, the customer shall pay only the actual cost," which is found in section 32 of Act 300, Public Acts of 1974, as amended (MCLA 257.1332; MSA 9.1720(32)) is unconstitutionally vague and therefore is struck from such section.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of State is permanently enjoined from implementing or enforcing the language, "If the actual cost of repair is less than the actual agreed-on estimated cost, the customer shall pay only the actual cost," found in section 32, Act 300 of the Public Acts of 1974, as amended (MCLA 257.1332; MSA 9.1720(32)).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a permanent injunction issue enjoining the Secretary of State of the State of Michigan from promulgating or enforcing rules pursuant to the Act in investigating, prosecuting or handling adjudcatory hearings concerning alleged violations of the rules under Act 300, Public Act of 1974, as amended (MCLA 257.1332; MSA 9.1720(22)).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no costs are awarded, a public question being involved.

(s) James T. Kallman
Circuit Judge

Copy mailed to Attorneys Bladen and Sigal
on November 3, 1976.

(s) S. J. M.

ORDER OF CLARIFICATION IN CIRCUIT COURT FOR THE COUNTY OF INGHAM, DATED NOVEMBER 16, 1976

At a session of said Court held in the County Building, City of Lansing, Michigan, County of Ingham, on the 16th day of November, 1976.

PRESENT: JAMES T. KALLMAN, Circuit Judge

Upon the motion of the Defendant, Richard H. Austin, Secretary of State for the State of Michigan, for a clarification of the Summary Judgment of this Court in the above captioned matter of November 3, 1976 at a hearing being held on this clarification as to the meaning of the Court's Order on Tuesday, November 16, 1976, and the Court hearing the arguments of counsel and being fully apprised of the files and records in this cause, and being informed in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of November 3, 1976 for Summary Judgment is hereby affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Order of Summary Judgment is hereby amended in the fifth full paragraph thereof to indicate as follows: MCLA 257.1301-257.1340; MSA 9.1720(1)-(40).

James T. Kallman
Circuit Judge

NOTE — Portion in italics deleted and initialed by J.T.K. and E.M.B., 12/1/76

ORDER OF THE SUPREME COURT OF THE STATE OF MICHIGAN IN CASE NOS. 59234 AND 59297, DATED APRIL 6, 1977

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 6th day of April, in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable

Thomas Giles Kavanagh,
Chief Justice,

G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
James L. Ryan,
Blair Moody, Jr.,
Associate Justices

On order of the Court, the applications for leave to appeal prior to decision by the Court of Appeals are considered, and the applications are DENIED, because the parties have failed to persuade the Court that the questions presented should be reviewed by this Court before consideration by the Court of Appeals.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme
(SEAL) Court at Lansing, this 6th day of April in the year of our Lord one thousand nine hundred and seventy-seven.

(s) Corbin R. Davis
Deputy Clerk

OPINION OF THE MICHIGAN COURT OF APPEALS IN CASE NO. 31100, BEFORE: DANHOF, C.J., AND ALLEN AND HEADING, JJ, FILED BY DANHOF, C.J., DATED APRIL 17, 1978

BEFORE: Danhof, C.J., and Allen and Heading, JJ.

Danhof, C.J.

The parties appeal by right from the circuit court's summary judgment for plaintiffs holding unconstitutional several provisions of 1974 PA 300 as amended by 1976 PA 12, codified as MCL 247.1301 *et seq;* MSA 9.1720(1) *et seq,* and commonly known as the Motor Vehicle Service and Repair Act. The circuit judge permanently enjoined the Secretary of State from implementing or enforcing the provisions held unconstitutional, but held that they were severable from the remainder of the act and that the secretary was entitled to enforce "all sections not declared unconstitutional."

The parties have devoted substantial portions of their briefs to arguments concerning the wisdom of the legislation before us for consideration. We do not pass upon the wisdom of legislative judgments, precisely because it is to the legislature that the power, duty, and heavy responsibility of making such judgments is entrusted. Const 1963, art 4, § 1. Our function is confined to reviewing the questions of law presented by the trial judge's findings of unconstitutionality.

> "The primary determination of public need and character of remedy in the exercise of the police power is in the legislature. Unless the remedy is palpably unreasonable and arbitrary to as needlessly to invade property or personal rights as protected by the Constitution, the act must be sustained. The presumption favors validity and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted." *Carolene Products Co* v *Thompson,* 276 Mich 172, 178; 267 NW 608 (1936).

Bearing these principles in mind, we proceed to consideration of the provisions of the act held unconstitutional by the trial judge.

I

Plaintiffs maintained, and the trial judge agreed, that the legislative scheme allowing the administrator[1] to make rules[2] investigate alleged violations,[3] prosecute, adjudicate, and impose sanctions[4] results in such a commingling of powers as to constitute a deprivation of due process under the Michigan Constitution. The trial judge concluded:

> "As administrator, the Secretary has the authority to investigate repair facilities. If it appears that there is a violation of the rules or statute the Secretary may prosecute and sit in judgment. The Secretary argues that due process is the embodiment of fair play. It is difficult to see how there can be fair play when a person has made a decision as to what is right or wrong (rule) and then the same person or one in the same department sits in judgment of one accused of violating that rule. Under such a system there is likely to be some bias, and unquestionably the appearance of bias on the part of the person sitting in judgment."

Accordingly, the trial judge held that the combination of functions in the administrator violated due process of law, relying on *Crampton* v *Department of State,* 395 Mich 347;

For several reasons, the holding in *Crampton* does not dictate a conclusion that the act under consideration is unconstitutional. In contrast with the statutorily defined composition of the appeal board in *Crampton*, the motor vehicle service and repair act does not mandate hearings before a "full-time law enforcement official" whose functions include not only administrative adjudication of the dispute arising under the act but also the instigation or prosecution, in separate *criminal* proceedings, of the same statutory violations. This conclusion derives in part from the fact that the Supreme Court gave no indication in *Crampton* that it found objectionable the inclusion of the Secretary of State or his representative on the appeal board, and in part from the fact that in *Wolney* v *Secretary of State*, 77 Mich App 61; ..... NW2d ..... (1977), this Court upheld the legislative response to *Crampton*.

After the decision in *Crampton* the appeal board was replaced by a hearing officer appointed by the Secretary of State[6] and the circuit court agreed with *Wolney's* contention that "when the Legislature amended the statute by making the sole member of the hearing panel a hearing officer appointed by the Secretary of State, it continued a procedure which was defective on the same due process grounds as the predecessor statute." *Wolney, supra*, at 66. On appeal, the *Wolney* panel observed:

> "[T]he Secretary of State is not such a [full time] law enforcement officer even though the Secretary of State is given certain enforcement powers.
>
> "In addition, the responsibilities of the Secretary of State in *Crampton* were delegated to an employee of the Secretary of State and in the present case the statute provides for the appointment of a hearing officer; in neither case has the Secretary of State

> given full time law enforcement personnel the duty of evaluating the credibility of other such personnel. Therefore the holding of *Crampton* in regard to full time law enforcement officers is not controlling in this case." *Wolney, supra*, at 67.

We recognize that the administrator's functions under this act are more comprehensive than those remitted to him under the implied consent law, since here he has investigatory and rule-making powers in addition to his adjudicative function. *Cf. Wolney, supra*, at 69. Nevertheless, we are persuaded, absent any indication in *Crampton* that the Supreme Court intended to impose, as a matter of Michigan constitutional law, due process limitations more stringent than those applicable under the Federal Constitution, that the combination of these several powers in the Secretary of State does not render the act unconstitutional. We are guided by the holding of the United States Supreme Court in *Withrow* v *Larkin, supra*, on which the Court relied in *Crampton* in applying the "probability of unfairness" standard enunciated in *Withrow*. In *Withrow* the Court said:

> "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" 421 US at 47; 95 S Ct at .....; 43 L Ed 2d at 723.

The Court concluded, however:

> "The contention that the combination of investigative and adjudicative functions *necessarily* creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion

to carry. It must overcome *a presumption of honesty and integrity in those serving as adjudicators;* and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and judicative powers on the same individual poses such a risk of *actual bias or prejudgment* that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow* v *Larkin, supra,* at 421 US 47; 95 S Ct at .....; 43 L Ed 2d at 723-724. (Emphasis added.)

The same language from *Withrow* was quoted approvingly by the Court in *In the Matter of DelRio,* 400 Mich 665, 690-691; ..... NW2d ..... (1977), in which the Court rejected respondent's contention that the combination of investigative and adjudicative roles in the Judicial Tenure Commission created an "inherent" risk of bias or prejudgment. In so holding, the Court stated that, "the authority is legion in support of the proposition that combining the investigative and adjudicative roles in a single agency does not necessarily violate due process in administrative adjudicaton," and also observed that, as here, respondent had failed to document his charge by any showing of *actual* risk of bias. 400 Mich at 690-691. The Court also noted that GCR 1963, 932.10 specifically requires the appointment of an independent master to preside over the adjudicative process, a factor quite similar to that cited by the Court in *Withrow*:

> "Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. For the generality of agencies, Congress has been

> content with § 5 of the Administrative Procedure Act, 5 USC § 554(d) [5 USC § 554(d)], which provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function * * *." *Withrow* v *Larkin, supra,* at 51, 95 S Ct at .....; 43 L Ed 2d at 726.

Our own Administrative Procedure Act, MCLA 24.282; MSA 3.560 (182), provides in pertinent part:

> "Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff *other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case.*" (Emphasis added.)

Further, the APA provides a procedure whereby a party who has reason to believe that the adjudicating officer's impartiality has been tainted can move for his disqualification to preside in the proceeding.[7]

We think it significant that in *DelRio, supra,* the Court did not cite or discuss its decision in *Crampton,* which offers inferential support for our narrow construction of the holding in that case. We agree with the *Wolney* panel that

"Examination of the principal case upon which *Crampton* relies shows that the rule in *Crampton* should not be expanded further." *Wolney, supra,* at 68.

Finally we do not believe that the added factor of the administrator's rule making power should alter the result. "An administrative agency may have administrative or executive, investigatory, legislative, or judicial powers or all or a combination of these." 1 Am Jur 2d "Administrative Law" § 77, p 872.

> "Some administrative agencies investigate violations of law and act as accusers as well as determine violations of their own regulations, or act as advocates or prosecutor as well as judge in the same proceeding.
>
> "The danger of unfairness is particularly great in an agency in which there is a high degree of concentration of both prosecuting and judicial functions, especially where the functions are combined in the same men. The courts have pointed out that in such situations the agency members must be zealous in the recognition and preservation of the right to a hearing by impartial triers of the facts, and such fusion of functions has been subjected to considerable criticism. However, the combination of functions has never been held to violate constitutional right or deny due process of law." *Id.* § 78, p 73.

In *Hoffman-LaRoche, Inc* v *Kleindienst,* 478 F2d 1, 13 (CA 3, 1973), which involved an administrative proceeding that culminated in the issuance of an order of general application, the Court said:

> "The fact that Hoffman may be one of those adversely affected explains the highly adversary character of the proceeding but does not change the generalized nature of the order. Although the proceeding involved a concrete factual situation from which factual inferences provided the basis for the Director's order, the facts and inferences therefrom were used to formulate *a basically legislative-type judgment of entirely prospective application. Since the proceedings were thus in substance rule making, the separation of prosecuting and decision making functions was not required.*" (Emphasis added.) (Citations omitted.)

In the present case the administrator has already promulgated rules having only prospective application, see 1976 AACS R. 257.101 *et seq,* and we see no due process objection to their future enforcement in the proceedings provided under the act in light of the provisions of the Administrative Procedures Act designed to ensure that such proceedings are fair and impartial. As the Supreme Court observed in *Attorney General ex rel Rich* v *Jochim,* 99 Mich 358, 371; 58 NW 611 (1894):

> "Due process is not necessarily judicial process. Administrative process, which has been regarded as necessary in government, and sanctioned by long usage, is as much due process as any other."

Accordingly, for the foregoing reasons, we reverse the judgment of the trial court holding unconstitutional the act's commingling of investigative, prosecutorial, rule making and adjudicative functions in the administrator.

II

Section 9 of the act provides:

> "The administrator shall * * * promulgate rules pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.
>
> "The rules shall include but not be limited to:
>
> "(i) Definitions of unfair and deceptive practices." MCLA 257.1309(i)(i); MSA 9.1720(9)(a).[8]

Plaintiff contended, and the circuit judge agreed,[9] that the act contained no standard to guide the administrator in exercising his rule making power and that therefore this section constituted an unconstitutional delegation of legislative power to the administrator.

Here, as in *Argo Oil Corp* v *Atwood*, 274 Mich 47, 52; 264 NW 285 (1935), "The attack is upon the statute itself, not upon the discretion exercised by the Secretary of State thereunder if the law be valid." The principles governing our inquiry into the validity of a statutory delegation to the administrator of rule making power were summarized recently in *Department of Natural Resources* v *Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976):

> "In making this determination whether the statute contains sufficient limits or standards we must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials.

> "While no hard and fast rule exists for determining whether a given statute has provided sufficient standards, a number of guiding principles have evolved in Michigan jurisprudence to assist in making a determination in this case.
>
> "First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. *Argo Oil Corp* v *Atwood, supra*, 53.
>
> "Second, the standard should be 'as reasonably precise as the subject matter requires or permits'. *Osius* v *St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25; 58 ALR2d 1079 (1956).[7]
>
> "The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation.[8] * * *
>
> "Third, if possible the statute must be construed in such a way as to 'render it valid, not invalid', as conferring 'administrative, not legislative' power and as vesting 'discretionary, not arbitrary, authority'. *Argo Oil Corp* v *Atwood, supra*, 53.

"[7] A standard cannot be considered 'as reasonably precise as the subject matter requires or permits' if it does not satisfy due process requirements. See decision in *State Highway Commission* v *VanderKloot*, 392 Mich 159, 169-178; 220 NW2d 416 (1974).

"[8] See 1 Am Jur 2d, Administrative Law, § 117, p 924; 1 Sutherland Statutory Construction (4th ed, Sands), § 4.16, p 102."

Reading the act before us as a whole, it is apparent, as the trial judge himself observed, that a "legislative intent may be gleaned from a reading of the entire statute." Focusing only on those sections that relate to "unfair and deceptive practices," we find that the act gives content to that standard. Section 32[10] of the act requires the repair facility to provide a writtten, itemized estimate of the price for labor and parts necessary for a specific job before commencing work, prohibits charges in excess of the estimated price without first obtaining the written or oral consent of the customer, renders the customer liable for the cost of returning the vehicle to its former condition if the customer refuses authorization for repairs in excess of the estimate that are subsequently determined to be necessary by the repair facility, and requires the repair facility to itemize such costs in writing. Section 32 also requires that the cost of diagnosis shall be contained in the written estimate provided before the diagnosis is undertaken. The obvious purpose of these provisions is to permit the consumer to enter into a transaction involving the repair of a sophisticated machine with reasonably precise awareness of the cost of such services, if he or she so desires, and to prevent unilateral imposition upon the consumer by the repair facility of additional costs in excess of the estimated cost without prior notice to and consent by the consumer. The section protects the repair facility by making the consumer liable for the cost of returning the vehicle to its former condition if permission to perform additional needed repairs is refused, and also provides, alternatively, that the consumer may waive the above rights by agreeing to "pay all reasonable costs of repair up to an amount stated." Waivers must be given "voluntarily and with full knowledge of the implications of the waiver," and waivers may not be used to evade the act.

To ensure that these provisions are effectuated, the the administrator has promulgated rules defining unfair and deceptive practices that prohibit contracts that use a waiver to circumvent or evade the act, and contracts that take "advantage of a customer's inability to reasonably protect his interests on account of illiteracy or inability to understand the language of an agreement, if the facility knows or reasonably should know of the customer's inability." 1976 AACS R 257.131(1)(a) and (b). The act prohibits misrepresentations by the repair facility,[11] and the rules promulgated by the administrator detail the meaning of this prohibition by enumerating the situations in which specific types of misrepresentations will be deemed unfair and deceptive practices.[12] Similarly, rules have been promulgated defining as unfair and deceptive practices various types of non-compliance with § 34 of the act,[13] which requires written statements of repairs and charges to be provided upon return of the vehicle to the customer, and § 33 of the act[14] granting customers the right to return of replaced parts upon completion of repairs, and requiring that customers be informed of that right.

It is apparent from the foregoing, which is by no means intended as an exhaustive or exclusive exposition of the sections of the act (and the rules promulgated pursuant to them) that give meaning and precise content to the term "unfair and deceptive practice," that § 9 does not delegate to the administrator unbridled authority or arbitrary discretion to declare practices unfair and deceptive. Rather, actions prohibited by the act, and non-compliance with the mandates of the act, constitute unfair and deceptive practices susceptible to more extensive definition by rule. The statutory provisions are precise and detailed, and provide definitive guidelines for the formulation of

rules explicating fully the meaning of the statutory mandates and prohibitions.

The complexity of modern motor vehicles and the rapid advance of automotive technology make it difficult, in some cases, to diagnose mechanical problems, estimate the cost of repairs, perform the repairs, determine whether the repairs have been properly performed, and decide whether a given repair is necessary or worthwhile. Given these complexities, we are satisfied that the standard provided by § 7's prohibition against engaging or attempting to engage in "a method, act, or practice which is unfair or deceptive," MCLA 257.1307; MSA 9.1720(7), and § 9's delegation to the administrator of authority to define unfair and deceptive practices, is "as reasonably precise as the subject matter requires or permits." See *Department of Natural Resources* v *Seaman, supra,* at 309. Read as a whole, the act prohibits unfair and deceptive practices defined in the sections of the act alluded to above. The legislature's use of the phrase "unfair and deceptive practices" as a standard to guide the administrator in the exercise of his rule making power thus delegates that power in terms sufficiently flexible to adapt the rules promulgated pursuant to the act to changing technology and business practices, but at the same time the administrator's discretion is limited by the parameters of the act as a whole.

Although we recognize that the strictures imposed upon the business practices of reputable repair facilities by the act and the rules promulgated pursuant thereto may produce burdensome results in some cases, we are also mindful of the gross abuses practiced by a segment of the repair industry, which the legislature sought to remedy by this act, and of our duty to construe the statutory response to the problem so as to " 'render it valid, not invalid,' as conferring 'administrative, not legislative' power and as vesting discretionary, not arbitrary, authority.' " *Department of Natural Resources* v *Seaman, supra,* at 309. In *Ranke* v *Corporation & Securities Commission,* 317 Mich 304, 307; 26 NW2d 898 (1947), the Court upheld a statute authorizing the commission to suspend or revoke real estate broker licenses for "*Any other conduct whether of the same or a different character than herein before specified,* which constitutes *dishonest or unfair dealing.*" (Emphasis added.) The Court said:

> "The limitation, placed upon the commission by the act, is that the conduct complained of must constitute dishonest or unfair dealing. *The act provides a standard by which the commission shall be guided in the making of rules.* It would be quite impossible for the legislature to enumerate all the specific acts which would constitute dishonest or unfair dealing upon the part of those engaged in the sale of real estate. The act authorizes the commission to enumerate additional grounds of dishonest or unfair dealing and to make rules in harmony with the subject matter legislated upon." 317 Mich at 309-310 (emphasis added).

Although the legislature could conceivably have provided more elaborate standards for the exercise of the administrator's power, it is clear that there is a standard; practices prohibited by rule must be "unfair or deceptive." This case is thus unlike *Osius* v *St. Clair Shores,* 344 Mich 693, 75 NW2d 25 (1956), in which the Court found that there were no standards to control exercise of the board's discretion. Reading the act as a whole, the "unfair or deceptive practices" standard provided by the act is sufficiently definite to render constitutional the

legislature's delegation of rule making power to the administrator, [15] and accordingly the trial court is reversed.

III

In *People* v *Wilde*, 42 Mich App 514; 202 NW2d 542 (1972), defendant, with the assistance of a "cooperative" insurance adjuster, inflated his estimate of the cost of repairing an automobile more than $400 over the actual cost of the repairs and was convicted of obtaining money under false pretenses.[16] This Court reversed the conviction because, since the insurance company knew that defendant's estimate contained misrepresentations, the element of reliance by the victim was absent. The Court said:

> "As offensive as cases involving people being duped by gross misrepresentations of value may be, the Legislature has failed to make such chicanery a crime." 42 Mich App at 518.

In § 32(1) of the act before us, quoted in full at n 10, ante, the legislature has attempted to curb such abuses by providing that "If the actual cost of repair is less than the agreed upon estimated cost, the customer shall pay only the actual cost."

Plaintiff argued, and again the trial judge agreed, that this sentence of the act is void for vagueness. The interpretations advanced by the parties and considered by the trial court are well summarized in the trial judge's opinion,[17] and will not be considered further. Our own view of the disputed sentence is different from those of the parties and the trial judge, and therefore we begin with a slate cleaned of all except what the legislature has written.

We begin with several familiar principles of statutory construction devised by the courts to assist them in negotiating the labyrinth of legislative linguistics. Statutes

come to us cloaked with a presumption of constitutional validity. *Manistee Bank & Trust Co* v *McGowan*, 394 Mich 655, 667; 232 NW2d 636 (1975). In construing a legislative act, if more than one construction is permissible, that which sustains the legislation will be adopted. *Loose* v *City of Battle Creek*, 309 Mich 1, 13; 14 NW2d 554 (1944), *Evans Products Co* v *State Board of Escheats*, 307 Mich 506, 533-535; 12 NW2d 448 (1943) (collecting rules of construction). Courts should strive to sustain the validity of a statute, if that can be done without doing actual violence to the language used in the act, *People* v *Harper*, 1 Mich App 480, 483; 136 NW2d 768 (1965), *aff'd* 379 Mich 440; 152 NW2d 645 (1967), appeal dismissed 392 US 644; 88 S Ct 2296; 720 L Ed 2d 1353 (1967), and whenever possible, an interpretation that does not create constitutional invalidity is preferred to one that does. *Schwartz* v *Secretary of State*, 393 Mich 42, 50; 222 NW2d 517 (1974). The rule requiring us to choose a constitutional reading of the statute applies when the language is ambiguous, *Brown* v *Saginaw Metal Casting*, 68 Mich App 85, 89; 241 NW2d 769 (1976), and the presumption of constitutionality may justify even a construction that is rather against a natural interpretation of the language used, if necessary to sustain the enactment. *People* v *Bandy*, 35 Mich App 53, 57; 192 NW2d 115 (1971). Courts prefer to impute to the legislature an absence of intention to take private property without just conpensation therefor, on the assumption that the legislature would not designedly commit an act of injustice. *Pigorsh* v *Fahner*, 386 Mich 508, 514; 194 NW2d 343 (1972). It is also well settled that a statutory interpretation that leads to an absurd result should be avoided. *In re Lambrecht*, 137 Mich 450, 454; 100 NW 606 (1904).

In construing a statute the words used are given their ordinary meaning. *American Telephone & Telegraph Co*

v *Employment Security Commission*, 376 Mich 271, 279; 136 NW2d 889 (1965). Here the asserted ambiguity results from the use of the words "cost" and "actual cost" in the last sentence of § 32(1). Throughout the preceding four sentences of § 32(1) the terms "price" or "estimated price" are used. The trial judge concluded that the change in terminology had some unfathomable significance that rendered the last sentence unconstitutionally vague, but once it is recognized, first, that the words "price" and "cost" are used interchangeably in common usage,[18] and, secondly, that it is only after a repair is completed that the actual cost to the customer can be computed, we see no insuperable obstacle to a constitutional construction of § 32(1).

Although good legislative draftsmanship would ordinarily call for use of the same term throughout the statute, the alteration in point of view that occurs between the time a repair is contemplated (estimated price) and the time the repair is completed (actual cost) explains the shift in terminology. It must be remembered that under the act the whole process of performing repairs begins with an *estimate*, which Webster defines as "a judgment made from usually mathematical calculation especially from *incomplete data:* A *rough or approximate calculation* (as of the number, amount, or size of anything)." (Emphasis added.) Having performed the repair, the repair facility is now in a position to compute the actual cost to the consumer of the service performed. It may be that in the course of the repair a part that was thought to need replacement will have been found serviceable. In that case, the "actual cost" of repair is the "estimated price" less the cost (included in the estimated price) of the part that was not replaced. The estimated price also might be reduced by discovering, in the course of performing the repair, that a

given operation, for which a labor charge was included in the estimated price, does not have to be performed, as, for example, when a part thought to need replacement or repair actually does not. In that case, the "actual cost" to to consumer is the "estimated price" less the cost of the part not replaced and the labor charge included in the estimated price for its replacement.[19] Just as § 32(1) permits the repair facility a margin of estimational error in its favor,[20] so it grants the customer the benefit of actual savings under the estimated price.

We construe the disputed sentence as follows: "If the actual cost of repair (being the sum of the cost to the consumer of parts actually used and labor actually required) is less than the agreed upon estimated cost, the customer shall pay only the actual cost." So construed, the provision is not vague, circular, not absurd. It does not take from the repair facility that margin of profit to which it is rightfully entitled. It means that the repair facility is entitled to be paid for the parts and services it actually provides, and that the customer is required to pay for only those parts and services he or she actually receives. This was manifestly the legislature's intent, however inartfully that intent may have been expressed, and it requires no great creative genius, but only common sense, for us to effectuate that intent.

CONCLUSION

As we have sustained those portions of the act held unconstitutional by the trial judge, the other questions raised on appeal need not be discussed. We express no opinion on the wisdom of the act, other than to observe that it reflects a comprehensive effort by the legislature to remedy some of the defects in the law that prompted our comments in *People* v *Wilde*, *supra*, at 518. Inasmuch and

insofar as it is constitutional, the act must be effectuated likewise by the courts.

The judgment below is reversed. No costs, a public question involved.

FOOTNOTES

[1] MCLA 257.1308; MSA 9.1720(8), provides:

"The Secretary of State or his designee shall administer this act. A person designated by the Secretary of State to act in his place shall not be affiliated with a motor vehicle repair facility."

[2] MCLA 257.1309(i): MSA 9.1720(9), provides that the administrator shall:

"Promulgate rules pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

"The rules shall include but not be limited to:

"(i) Definition of unfair and deceptive practices.

"(ii) Definitions of minor repair services.

"(iii) Criteria for determining the competency of specialty and master mechanics, as a prerequisite to continued certification under this act.

"(iv) Definition of repair categories for the certification of specialty and master mechanics.

"(v) Other rules as are necessary to implement this act."

[3] MCLA 257.1326; MSA 9.1720(26), provides:

"(1) The administrator shall on his own initiative or in response to complaints, make reasonable and necessary public or private investigations within or outside this state

and gather evidence against a person who violated or is about to violate this act or a rule or order hereunder.

"(2) The administrator may:

"(a) Require or permit a person to file a statement in writing or otherwise as the administrator determines as to all the facts and circumstances concerning the matter to be investigated.

"(b) Mediate disputes between parties arising from violations of this act or an administrative rule.

"(c) Develop conditions of probation or operation for the facility or mechanic mutually agreed upon and signed by the facility or the mechanic and the administrator instead of further disciplinary proceedings.

"(d) On his own initiative, conduct spot check investigations of motor vehicle repair facilities registered or required to be registered throughout the state on a continuous basis to determine whether or not the facility is in compliance with this act and rules promulgated hereunder. The administrator may not alter the odometer on a vehicle employed in such investigations or deliberately misrepresent the condition of the vehicle.

"(e) Conduct mechanical and diagnostic examinations of vehicles when there are reasonable grounds to believe that an unlawful act or practice was used to produce the repair or to make the repair."

Under MCLA 257.1317; MSA 9.1720(17), "The registered facility or one required to be registered under this act shall be open to inspection by the administrator during reasonable business hours. A person who hinders, obstructs, or otherwise prevents an inspection is in violation of this act." The act also requires that a repair facility "shall maintain such reasonable records as are required by rules promulgated to carry out this act. The records shall be open for reasonable inspection by the administrator or other law enforcement officials as specified by rule." MCLA 257.1318; MSA 9.1720(18).

[4] MCLA 257.1321(1); MSA 9.1720(21)(a), provides:

"If the administrator determines after notice and a hearing that a person has violated this act or a rule promulgated pursuant to it, or engaged in an unfair or deceptive method, act, or practice, directly or through an agent or employee, he may issue an order requiring the person to cease and desist from the unlawful act or practice or to take such affirmative action as in the judgment of the administrator will carry out the purposes of this act."

Further, upon making "a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order" the administrator may issue a temporary cease and desist order prior to holding a hearing on the alleged violation. MCLA 257.1321(2); MSA 9.1720(21)(b). In addition, the act empowers the administrator to "deny, suspend, or revoke a registration, certificate, or mechanic trainee permit after notice and opportunity for a hearing where the administrator determines that the facility, mechanic, or trainee" engaged in one of eleven specified categories of prohibited conduct.

The act also provides an alternate, concurrent, enforcement procedure:

"If it appears that a person has engaged, is engaging, or is about to engage in a method, act, or practice in violation of this act or the rules promulgated hereunder, the Attorney General or county prosecutor, may after receiving notice of an alleged violation of this act, with or without prior administrative proceedings having occurred, bring an action in the name of the people of this state to enjoin that method, act, or practice." MCLA 257.1323; MSA 9.1720(23).

Upon receipt of notice of an alleged violation of the act, the Attorney General or prosecuting attorney "shall immediately forward written notice of the alleged violation" to the administrator. MCLA 257.1324; MSA 9.1720(24).

The act also contemplates informal resolution of disputes between parties contesting a violation of the act by means

of a "voluntary assurance" by the motor vehicle repair facility that the facility will discontinue the alleged violation. MCLA 257.1327; MSA 9.1720(27). Such assurances may include provisions for refund, affirmative action by the facility to correct alleged violations, or for the deposit in escrow of money for restitution to an aggrieved consumer pending the outcome of an action pursuant to the act.

[5] "Among the situations identified by the Court as presenting that risk are where the judge or decision maker

(1) has a pecuniary interest in the outcome;

(2) 'has been the target of personal abuse or criticism from the party before him';

(3) is 'enmeshed in [other] matters involving petitioner * * *'; or

(4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." *Crampton, supra,* at 351 (footnotes omitted).

[6] 1976 PA 9, see MCLA 257.625f; MSA 9.2325(6), MCLA 257.322; MSA 9.2022.

[7] MCLA 24.279; MSA 3.560(179):

"An agency, 1 or members of the agency, a person designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another pre-

siding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom."

[8] The rules promulgated pursuant to this authority appear at 1976 AASC R 257.131 to -.137, and include provisions concerning contract and invoice terms, repair and parts replacement, warranties, advertising and representations, estimates and charges, and coercive practices.

[9] The trial judge stated in his opinion:

"It is true that unfair and deceptive practices may be too numerous for the legislature to enumerate. This is evidenced by the four pages of definitions of unfair and deceptive practices contained in the rules as promulgated by the Secretary. However, there remains a question of whether there is an adequate standard to guide the Secretary in defining unfair and deceptive practices.

"The title of the Act indicates that its purpose is 'to proscribe unfair and deceptive practices.' Little else is stated except that the Secretary may promulgate rules in this area. While a legislative intent may be gleened from a reading of the entire statute, the cases clearly indicate that there must be a reasonably precise standard. Such a standard is lacking here. The court is of the opinion that there has been an unconstitutional delegation of legislative authority to the Secretary."

[10] Sec. 32. (1) A motor vehicle repair facility shall give to the customer a written estimate, itemizing as closely as possible the price for labor and parts necessary for a specific job prior to the commencement of work. A facility shall not charge for work done or parts supplied in excess of the estimated price or in excess of the limit stated by the customer in the waiver provided for in subsection (3) without the knowing written or oral consent of the customer which shall be obtained at some time after it is determined

that the estimated price or stated limit is insufficient and before any work not estimated or in excess of the limit is done or the parts not estimated or in excess of the limit are supplied. If a waiver is not signed as provided in subsection (3) and the estimated price is exceeded by not more than 10% or $10.00 whichever is lesser, the written or oral consent of the customer for the excess charge need not be obtained unless specifically requested by the customer. This section shall not be construed as requiring a motor vehicle repair facility, mechanic, or mechanic trainee to give a written estimated price if he agrees not to perform the requested repair. If the actual cost of repair is less than the agreed upon estimated cost, the customer shall pay only the actual cost.

"(2) If the facility or mechanic informs the customer that the price for repair will exceed the written estimate or the stated limit in the waiver and the customer does not want the repair work performed then the customer is liable for all reasonable costs to return the vehicle to the condition it was when it entered the facility. These costs should be indicated in written form itemizing the costs as closely as possible with a copy given to the customer. The cost of a diagnosis to be made, whether or not the customer authorizes repairs to be performed, shall be contained in the written estimate before the diagnosis is undertaken.

"(3) If a customer initiates a request for service or parts for the repair of a motor vehicle without receiving a written estimate and voluntarily agrees to pay all reasonable costs of repair up to an amount stated by the customer, a repair facility may obtain from the customer a waiver of his right to receive a prior estimate of repair costs. The wiaver shall be in 14 point or larger bold capital type face and executed with 1 copy to the customer requesting the repairs * * *."

After specifying the form of such waivers, the section provides:

"This waiver shall not be effective unless given by the customer voluntarily and with full knowledge of the im-

plications of the waiver. A motor vehicle repair facility or anyone in its employ shall not make use of the waiver in an attempt to evade this act." MCLA 257.1332; MSA 9.1720(32).

[11] "Sec. 35. A resident agent, director, officer, or partner of a motor vehicle repair facility who knowingly authorizes, directs or makes a false statement or misrepresentation concerning the method or price of repair of a motor vehicle, or who knowingly fails to comply with the terms of a final cease and desist order is subject to penalties under this act. Each violation constitutes a separate offense."

[12] The rules define as unfair and deceptive, "A contract which has gross discrepancies between the oral representations of the facility and the written agreement covering the same transaction," and provide that

"(2) It is an unfair and deceptive practice to:

> "(a) Make, either written or orally, an untrue or misleading statement of a material fact.
>
> (b) Fail to reveal a material fact, the omission of which tends to mislead or deceive the customer and which fact could not reasonably be known by the customer.
>
> * * *
>
> (d) Allow a customer to sign an acknowledgement, certificate, or other writing which affirms acceptance, delivery, compliance with a requirement of law, or other performance, if the facility knows or has reason to know that the statement is not true." 1976 AACS R 257.131(1)(c), and (2)(a)(b) and (d).

Other rules detailing various types of misrepresentations as unfair and deceptive practices in connection with other provisions of the act include 1976 AACS R 257.132(e) and (f), 1976 AACS R 257.134 (Advertising and representations"), and 1976 AACS R 257.137.

[13] MCLA 257.1334; MSA 9.1720(34), which provides:

"Sec. 34. A motor vehicle repair facility, including a gasoline service station which performs any of the repairs listed in the repair categories of certification for specialty mechanics or developed by the administrator by rule, shall give to each customer a written statement upon return of the repaired vehicle to the customer. The statement shall disclose:

"(a) Repairs needed, as detedmined by the facility.

"(b) Repairs requested by the customer.

"(c) Repairs authorized by the customer.

"(d) The facility's estimate of repair costs.

"(e) The actual cost of repairs.

"(f) The repairs or services performed, including a detailed identification of all parts that were replaced and a specification as to which are new, used, rebuilt, or reconditioned.

"(g) A certification that the repairs were completed properly or a detailed explanation of an inability to complete repairs properly. The statement shall be signed by the owner of the facility or by a person designated by the owner to represent the facility. The name of the mechanic or mechanics who performed the diagnoses and the repair shall also appear on the statement."

Rules defining various types of noncompliance with sec. 34 of the act as unfair and deceptive practices include 1976 AACS R 257.131(j) (i) through (vii), 1976 AACS R 257.132 (a), (e), (f), and (h), and 1976 AACS 257.136 ("Estimates and charges).

[14] MCLA 257.1333; MSA 9.1720(33). 1976 AACS R 257.136 (d) provides that "It is an unfair and deceptive practice to : * * * Fail to inform a customer, at a time prior to the customer executing a document or engaging the fa-

cility for the work, by the use of a notice as required by § 33 of the act, of his right to receive or inspect replaced parts for which he will be charged in the repair of his motor vehicle."

[15] Plaintiffs' reliance on *McKibbin* v *Corporation & Securities Commission*, 369 Mich 69; 119 NW2d 557 (1963), is misplaced. Although that case involved the same statute upheld in *Ranke*, the question was whether the anti-discrimniation rule adopted by the commission was within the scope of its legislatively delegated power. 369 Mich at 78, 81. *McKibbin* involved a challenge of a rule promulgated pursuant to the statute, whereas *Ranke* involved a challenge of the statute itself. Compare *Argo Oil Corp* v *Atwood*, *supra*, at 52.

[16] The inflated estimate included a kickback for the adjuster and a charge for repairing non-existent damage, as well as a paint job for the entire car included to induce the owner of the car to go along with the scheme.

[17] The trial judge reasoned as follows:

"Section 32, the section providing for estimates, is the target of the vagueness attack. As mentioned earlier that section provides that the facility shall give the customer a written estimate of the *price* for labor and parts for a specific job. It also provides that 'if the actual cost of repair is less than the agreed upon estimated cost, the customer shall pay only the actual cost.' What meaning should be given to this statement?

"It would appear that the 'estimated cost' refers to the written price estimate that must be given to the customer. The term 'actual cost of repair' on its face would appear to mean the cost to the garageman for completing the repair. Therefore, the statement in question would mean that if the cost to the garageman to complete the repair is less than the estimated price than the customer pays only

what it cost the garageman to complete the repair. The Defendant argues that such an interpretation would be absurd. The Plaintiff argues that such an interpretation would be a taking without due process in violation of the Fourteenth Amendment because it denies the garageman his profit.

"What then is the correct interpretation? The Defendant asserts that the term 'cost' refers to the amount of money a customer will actually pay the facility for a given repair. Under the Defendant's view, the actual cost of repair would be the amount the customer actually pays. Therefore, the statement in question would read: If the amount of money the customer actually pays is less than the agreed on estimated cost the customer shall pay only the amount the customer actually pays. Aside from making very little sense the statement provides no definitive guideline as to how the actual cost of repair is to be measured. While the Defendant seems to have no problem with the term 'actual cost of repair' the garageman would be at a loss as to what the term means and how it is to be measured.

"Confusion is added by the Defendant's assertion that 'if the actual work performed has a value or price or cost to the consumer less than that estimated, then the consumer should only pay that which is the lesser.' While 'price' may be included in the term 'cost' where does 'value to the customer' come in? Such a term is nebulous at best, and when inserted into the statute it is apparent that reasonable minds would have to guess as to its meaning. The garageman has no way of knowing what the value of the repair is to the consumer. If the consumer knows he will pay only the value of the repair he will obviously state that the repair is of little value.

"Based on the preceding discussion the Court can only conclude that the statement 'if the actual cost of repair is less than the agreed on estimated cost, the customer shall pay only the actual cost.' appearing in Section 32 of Public Act 300 is unconstitutionally vague."

[18] Webster's Third New International Unabridged Dictionary (1964) defines "price" as "the quantity of one thing that is exchanged or demanded in barter or sale for another: A ratio at which commodities and services are exchanged," or "the amount of money given or set as the amount to be given as a consideration for the sale of a specified thing". "Cost" is defined as "the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for services rendered: *Charge, price.*" (Emphasis added.) "Actual cost" is cost based on the most factual allocation of historical cost factors" and "estimated cost" is "cost in cost accounting estimated in advance of production or construction."

[19] This is not to say that the repair facility cannot charge the consumer for the labor expended in determining that the part did not need replacement. Nor do we see anything in the act that would forbid a repair facility to compute its labor charges based on the "flat rate manual" compiled by automobile manufacturers for use in computing payments to dealers for repairs performed in the fulfillment of the manufacturer's warranty, so long as that method of computation is disclosed to the customer upon request. See 1976 AACS R 257.136(1). We do not perceive any legislative intent to penalize a repair facility for its efficiency, and it would seem to be in the manufacturers' interest to ensure that such "flat rates" are reasonable approximations of the time required for a normally skilled mechanic to perform the repair. On the other hand, if labor charges included in the estimated price are actual estimates of the time required ("judgment times"), rather than "flat rates", as plaintiff Ramsay testified they sometimes are when the flat rate manual does not list a given operation, and the actual time it takes to perform the operation is less than the estimated time, the consumer is entitled to the benefit of this error in judgment, and under the act he may be charged only for the actual time it took to perform the operation.

[20] "If a waiver is not signed as provided in subsection (3) and the estimated price is exceeded by not more than 10% or $10.00 whichever is lesser. the written or oral consent of the customer for the excess charge need not be obtained unless specifically requested by the customer." MCLA 257.1332(1); MSA 9.1720(32)(a).

OPINION CONCURRING IN PART AND DISSENTING IN PART FILED BY H. L. HEADING, C.J., DATED APRIL 17, 1978

Before: Danhof, C.J., and Allen and H. L. Heading, JJ.

H. L. HEADING, J. (Concurring in part; dissenting in part)

The parties appeal by right from the circuit court's summary judgment for plaintiffs holding unconstitutional several provisions of the Motor Vehicle Service and Repair Act. MCLA 257.1301 *et seq.*; MSA 9.1720(1) *et seq.* The circuit judge permanently enjoined the Secretary of State from implementing or enforcing the provisions held unconstitutional.

Plaintiffs maintained and the trial judge agreed that the legislative scheme allowing the administrator to make rules, investigate alleged violations, prosecute, adjudicate, and impose sanctions results in such a commingling of powers as to constitute a deprivation of due process under the Michigan Constitution.

The majority holds that this scheme which permits the administrator to make rules, investigate, prosecute, adjudicate and impose sanctions is constitutional. I disagree. I adopt the trial judge's reasoning and concur with his conclusion that the scheme violates due process of law and is therefore unconstitutional. I do not feel that it is

necessary for me to comment further because the trial judge's opinion is well reasoned.

As to the second and third points discussed in the majority opinion, I concur.

ORDER OF THE SUPREME COURT OF THE STATE OF MICHIGAN IN CASE NO. 61405, DATED JULY 5, 1978

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 5th day of July in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable

Thomas Giles Kavanagh,
Chief Justice,

G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
James L. Ryan,
Blair Moody, Jr.,
Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme
(SEAL) Court at Lansing, this 5th day of July in the year of our Lord one thousand nine hundred and seventy-eight.

(s) Corbin R. Davis
Deputy Clerk

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES, FILED AUGUST 23, 1978

Notice is hereby given that Automotive Service Councils of Michigan and Ramsay Collision, Inc. hereby appeal to the United States Supreme Court from the order of the Michigan Supreme Court, entered in the above captioned proceeding on July 5, 1978, denying plaintiffs' application for leave to appeal from the final judgment of the Michigan Court of Appeals, entered on April 17, 1978, reversing the Order of Clarification, entered November 16, 1976, of Partial Summary Judgment, entered November 3, 1976. This appeal is taken only from that part of the Michigan Supreme Court order which leaves intact the finding of the Michigan Court of Appeals that 1974 Michigan Public Act No. 300, as amended by 1976 Michigan Public Act No. 12;

MCLA §257.1301, *et seq.*, is not violative of rights guaranteed by the United States Constitution, Amendment 14, insofar as said Act delegates to the defendant Michigan Secretary of State such a panoply of commingled powers, without legislative standards, as to leave Plaintiffs deprived of procedural due process safeguards.

This appeal is taken pursuant to 28 USC §1257(2) or, in the alternative, 28 USC §1257(3) and 28 USC §2103.

Dated: August 22, 1978

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(s) Paul Sigal
(s) Leslie R. Seeligson

NOTE: Filed with Michigan Supreme Court and with Michigan Court of Appeals on August 23, 1978.

PROOF OF SERVICE OF NOTICE OF APPEAL. DATED AUGUST 22, 1978

STATE OF MICHIGAN
ss.
COUNTY OF WASHTENAW

Christine W. Weintraub, being first duly sworn, deposes and says that on the 22nd day of August, 1978, she mailed three (3) copies of the Notice of Appeal to Frank J. Kelly, Attorney General, Attention Edwin M. Bladen, Asst. Attorney General, 670 Law Building, 525 West Ottawa, Lansing, Michigan 48913; one copy of the Notice of Appeal to the Clerk of the Court, Court of Appeals, 600 Washington Square Building, Lansing, Michigan 48933; and one copy of the Notice of Appeal to the Clerk of the Court, Michigan Supreme Court, 2nd Floor Law Building, 525 West Ottawa, P.O. Box 30052, Lansing, Michigan 48909, by enclosing same in envelopes addressed to them at their respective offices and depositing same in the United States Mail with postage fully prepaid.

(s) Christine W. Weintraub
Deponent

Subscribed and sworn to before me this 22nd day of August, 1978.

(s) Leslie R. Seeligson
Notary Public, Washtenaw County, Michigan
My Commission expires: May 29, 1979

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-553

AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN,
a Michigan Not for Profit Corporation,

and

RAMSAY COLLISION, INCORPORATED,
a Michigan Corporation,

Plaintiffs-Appellants,

vs.

RICHARD H. AUSTIN, Secretary of State
for the State of Michigan,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

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AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN,
a Michigan Not for Profit Corporation,

and

RAMSAY COLLISION, INCORPORATED,
a Michigan Corporation,

Plaintiffs-Appellants,

vs.

RICHARD H. AUSTIN, Secretary of State for the State of Michigan,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the appeal from the final judgment of the Supreme Court of the State of Michigan which denied leave to appeal the final decision of the Court of Appeals of the State of Michigan be dismissed or affirmed on the ground that the argument is so insubstantial as to warrant no further argument.

I.

STATEMENT

A. Proceedings Below

Appellants' summary or concise statement of the case found in their jurisdictional statement at Pages 4 to 7 fairly summarizes the proceedings leading to the instant appeal.

B. Nature of This Appeal

This appeal involves the validity of the Michigan Motor Vehicle Service and Repair Act (1974 PA 300, as amended; MCLA 257.1301, *et seq*) to the extent that the act names the Secretary of State of the State of Michigan administrator and empowers that administrator to promulgate rules defining unfair and deceptive acts and practices, investigate violations of the act or rules, and adjudicate through the administrative process those violations.

The statute provides in Section 22 (MCLA 257.1322) that the administrator (the Secretary of State) may deny, suspend or revoke a registration, certificate or permit only after notice and an opportunity for a hearing.

The hearing and the proceedings involved therewith must be handled and conducted in accordance with Michigan's Administrative Procedures Act (1969 PA 306, as amended; MCLA 24.201, *et seq*), which provides in Chapters 4, 5 and 6 (MCLA 24.271- .... 306) extensive protections and procedural due process in contested cases, licensing hearings and ultimately judicial review of the agency actions. Notable

among those procedures there is included mechanisms whereby a licensee or respondent may object and have removed a hearing officer from the particular case because of bias or other disqualifications.

Appellants' contentions here as well as throughout the course of this litigation below are that the Michigan statute governing auto repair practices, because it alone authorizes the administrator to perform the various functions of rulemaking, investigations and adjudication, necessarily compels a conclusion that a person subject to the act is deprived of procedural due process. Appellants contend that the Appellee's mere status as the administrator of the statute is sufficient to deny procedural due process because the Appellee is empowered by statute to perform the enumerated functions, and thus cannot ever be honest or impartial.

II.

ARGUMENT

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

The decisions of the Michigan Court of Appeals and the Supreme Court to deny leave therefrom are clearly correct. In *Withrow* v *Larkin*, 421 US 35; 95 S Ct 1456; 43 L Ed 2d 712 (1975), this Court concluded that a state administrative agency charged with the authority and responsibility to investigate and adjudicate alleged violations of the applicable statute did not "necessarily" create an unconstitutional risk of bias in administrative adjudication.

The Michigan Court of Appeals in rendering its decision in the matter below relied upon *Withrow* v *Larkin, supra*, as

the controlling expression by this Court of its views on the question now presented by Appellants. The Michigan Supreme Court has also in its decision relied upon *Withrow* v *Larkin, supra,* in rejecting the appeal of a state court judge who also contended that under Michigan law the combination of investigative and adjudicative roles created an "inherent" risk of bias. See, *In the Matter of Del Rio,* 400 Mich 665; 256 NW2d 727 (1977). This Court dismissed the appeal for want of a substantial federal question, 434 US 1029; 98 S Ct 759; 54 L Ed 2d 777 (1978).

The instant appeal is not unlike and is substantially equivalent to both *Withrow* v *Larkin, supra,* and *In the Matter of Del Rio, supra.* Here we have an administrative agency who investigates and adjudicates allegations of wrongdoing asserted to have been committed by persons subject to the agency's jurisdiction.

Appellants essentially argue that because the agency, the Michigan Secretary of State, is authorized to promulgate rules defining unfair and deceptive acts and practices in the motor vehicle repair business, this additional duty comingled with the investigative and adjudicative responsibilities has now arisen to a level overcoming the presumption of honesty and integrity in those serving as adjudicators. This argument results from the misconception advanced by Appellants that the terms "unfair and deceptive" are too inherently vague as to in effect permit the adjudicator to decide for himself what is a violation of law and what is not. That argument is without foundation or substance in both state and federal law.

In *Federal Trade Commission* v *Sperry & Hutchinson Co,* 405 US 233; 92 S Ct 898; 31 L Ed 2d 170 (1972), this Court recognized two important legal theorums in connection with this issue. First, that the concepts of unfair and deceptive

were not so inherently vague as to amount to a delegation of lawmaking powers to a federal administrative agency. Second, that the administrative agency itself is empowered to determine in appropriate contexts the extent of what by rule will constitute an unfair and deceptive act or practice, not being confined to some arbitrary standard such as "unfair methods of competition."

The State of Michigan by legislative action has in effect created a "little FTC" in the motor vehicle repair business in the Secretary of State.

The various states, like Michigan, have now turned their attention to unfair and deceptive trade practices, and, relying upon almost 70 years of federal experience and precedent, have adopted the same approach to such conduct. The state's reliance upon federal precedent now ought not form the basis for uncertainty in dealing with such measures.

The state act now in issue before this Court is one which forbids auto repairers from engaging in unfair and deceptive acts and practices and permits the administrative agency charged with enforcement to define what particular acts and practices in such a business will be unfair and deceptive. The terms are not vague.

As early as 1919, the Federal Trade Commission Act was attacked as vague and indefinite. Upholding an FTC order against Sears, Roebuck & Company, the United States Court of Appeals for the Seventh Circuit rejected the charge of vagueness, stating that the phrases "unfair methods of law," "unsound mind," "undue influence," "unfaithfulness," "unfair use," "unfit for cultivation," "unreasonable rate," and "scheme to defraud" can all be interpreted by the courts without need for a schedule of forbidden conduct.

If Michigan's auto repair law is to be effective to prevent improper conduct by mechanics and garagemen, enforcement officials must recognize that the act was not meant to provide precise definition to this area of the law. In fact, precise definition would be restrictive, and the officials would be unable to cope with new and ingenious conduct as is arises from time to time.

The Michigan courts have found it not so offensive to our constitution for the legislature to proscribe unfair and deceptive acts and practices in the auto repair business. And, Michigan's courts' decisions are consistent with and follow the lead of this Court's opinions from *Federal Trade Commission* v *R F Keppel & Bros, Inc*, 291 US 304; 54 S Ct 423; 78 L Ed 814 (1934), to *Federal Trade Commission* v *Sperry & Hutchinson & Co, supra*, (1972).

Appellants, then, are in effect asking this Court to take jurisdiction of this appeal in order to reexamine settled principles established in *R F Keppel & Bros, Inc*, and its progeny.

We think this inappropriate and that the precedent is legion establishing the insubstantiality of the arguments presented for consideration by the Appellants to this Court.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so insubstantial a federal question as not to need further argument, and Appellee respectfully moves the Court to dismiss the appeal, or, in the alternative, to affirm the final judgment entered in the cause by the Supreme Court of the State of Michigan.

Respectfully submitted,

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Dated: October 23, 1978